Supreme Court, U.S.
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No. 99-

In the

Supreme Court of the United States

JERON J. LAFARGUE and SUSAN KYLE, et al.,
Petitioners

v.

THE UNITED STATES OF AMERICA;
LOUISIANA INTRASTATE GAS COMPANY, L.L.C.,
Respondents

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by this Court include the following:

1. Whether the district court lacks subject matter jurisdiction over a suit against the United States to adjudicate disputed title to real property in which the United States claims an interest, when the United States has waived or disclaimed any interest in the subject (disputed) property prior to the actual commencement of the trial pursuant to section 2409a of the Quiet Title Act, 28 U.S.C.A. § 2409a;

2. Whether the district court has any discretion to refuse to confirm a valid disclaimer filed by the United States pursuant to section 2409a(e) of the Quiet Title Act, 28 U.S.C.A. § 2409a(e);

Assuming, *arguendo*, that the court has jurisdiction over the matter:

3. When the United States steps down from its position of sovereignty and enters into a contract with private individuals, whether the Quiet Title Act, 28 U.S.C.A. § 2409a, can shield the government from the same state laws that govern contracts between private citizens.[1]

4. Whether the application of "federal principles" and the common law of New Jersey, Massachusetts and Oregon to a civil law property dispute arising solely within the State of Louisiana and governed exclusively by the Louisiana Civil Code is in direct conflict with the United States Supreme Court decision in United States v. Winstar, 518 U.S. 839, the Erie Doctrine, 304 U.S. 64, and the Full Faith and Credit Clause of the U.S. Constitution, U.S. Const. art. IV, § 1.

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[1]United States v. Winstar, 518 U.S. 839 (1996); Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

5. In interpreting the laws of the state of Louisiana, whether a federal court must step into the role of Louisiana judges who are called upon to think and act as civil-law jurists when deciding cases under the Louisiana Civil Code, and not as judges in the Anglo-American tradition who are more often engaged in the interpretation and application of law derived from common law principles and sources outside the ambit of the civil code. Hulin v. Fibreboard Corp., 178 F.3d 316, 319, 328 (5th Cir. 1999).

6. Whether an express reverter clause was necessary in order for a donation of a servitude to the United States to terminate and revert back to the donor when the government ceased to use the servitude for the purposes for which it was granted.

PARTIES TO THE PROCEEDING

Petitioners

Ronald Richard, Septime Richard, Jr., Richard Family Trust and/or Teresa C. Richard, as Trustee for the Richard Family Trust, Malcolm G. Barlow, Sr., Virginia B. Nolan, Nancy Blanchard Beard, Alice B. Melanson, Louise B. Charitat, Pauline B. Clause, Celeste B. Dawson, Mary Alice Gomez Brown, Lula Mae M. Caldwell, Marguerite G. Couvillion, Estelle B. Hull, Roy Edwin Barlow, Michael C. Barlow, Leonard J. Gilbert, Jr., Joseph B. Blanchard, Henry L. Blanchard Estate, Corrine O. Randazzo, Virgie Lee Alexander, Marie B. Poche, Estelle B. Malagarie, Barry A. Gomez, Wilbert A. Gomez, Jr., Lillian N. Harelson, Electa G. Barlow, Blanche D. Gilbert, Joseph V. Gilbert, Sr., Janet Blanchard Beatrix, Richard A. Gomez, Wayne A. Gomez, Christine Weatherford, Phyllis B. Mock, Dixie Mae G. Suffrin, Anita Weaver, Lenes J. Gomez, Clarence L. Barlow, Jr., Dixie Gomez Culotta, Ramona G. Perrin, Patricia B. Walker, Stan Warburton, Jennifer Lynn Caves, Wilfred J. Noel, Jr., Hazel Ann B. Andrews, Betty Marie G. Hopkins, Lewis J. Gomez, Lillie Marie G. Berthelot, Delores N. Lejeune, Jacqueline B. Breaux, Monica Ann Falcon, Wilfred Roger Falcon, Eddie J. Callegan, Jr., Shasta G. Isbell, Robert A. Gomez, Wilbert A. Gomez, Jr., Gwynne G. Hornbuckle, Tommy A. Gomez, Marion C. Miles, Randall A. Gomez, Gloria Ann G. Clebert, Todd A. Gomez, Gloria Lynn Gomez, and Shirley Gomez Moon.

Respondents

United States of America and Louisiana Intrastate Gas Company, L.L.C.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING iii

OPINIONS AND ORDERS REPORTED 1

JURISDICTIONAL BASIS 1

CONSTITUTIONAL PROVISIONS AND STATUTES PRIMARILY RELIED UPON 2

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. Grounds for Granting Writ of Certiorari 8

II. The District Court Lacked Jurisdiction over Petitioners' QTA Claim Because the United States Disclaimed All Interest in the Subject Property. 9

A. The Quiet Title Act 9

B. The Disclaimer 11

C. General Principles of Jurisdiction are not Applicable to the QTA 11

D. The Court Has No Discretion to Refuse Confirmation of a Disclaimer 13

E. The Fifth Circuit's Reliance on *Delta Savings* and *Bank of Hemet* was Misplaced 14

III. The QTA Cannot Shield the United States from Louisiana Civil Code Which Supplies the Applicable Rule of Law. 15

IV. The Fifth Circuit's Failure to Apply the Louisiana Civil Code Violates *Winstar*, the Erie Doctrine, the Full Faith and Credit Clause of the U.S. 19

A. The Common Law of New Jersey, Massachusetts and Oregon Have Nothing in Common With The Louisiana Civil Code . 20

B. When a Donor Has Imposed Conditions Upon The Donee There Is No Necessity For an Express Stipulation of a Reverter Clause . 22

C. The Donation Was Made for the Express Purpose of Constructing, Operating and Maintaining an SPRP Oil Pipeline 25

D. Impossibility of Use: Decommissioning the Pipeline Extinguished the Servitude 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964) 18

Bank of Hemet v. United States, 643 F.2d 661 (9th Cir.1981) 11, 14, 15

Bank One of Texas v. United States, 157 F.3d 397, 403 (5th Cir. 998), *cert. denied*, 119 S.Ct. 1761 (1989) 16

Bily v. Illinois Central Gulf Railroad Co., 637 F. Supp. 127 (N.D. Ill. 1986) 8

Block v. North Dakota, 461 U.S. 273 (1983) 8, 9, 10

Board of Trustees of Columbia Road Methodist Episcopal Church of Bogalusa v. Richardson,44 So.2d 321 (1949) 22

Board of Trustees of Ruston Circuit v. Rudy, 187 So.2d 549 (La. 1939) 22

Cascio v. DePaula, 27 So.2d 453 (La. App. 1st Cir. 1946) 29

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) 16

Cooke v. United States, 91 U.S. 389 (1875) 16

Dautreuil v. Degeyter, 436 So.2d 614 (La. App. 3d Cir. 1983) 26

Delta Savings & Loan v. IRS, 847 F.2d 248
(5th Cir. 1988) 11, 14, 15

Erie Railroad Co., v. Tompkins, 304 U.S. 64
(1938) 9, 16, 17

Gardner v. Stager, 103 F.3d 886, 887 (9th Cir. 1996) 12

Guzzetta v. Pipeline Co., 485 So.2d 508 (La. 1986) .. 20, 30

Heirs of Primeaux v. Erath Sugar Company, 484 So.2d 717
(La. Ct. App. 1986) 22, 24

Hulin v. Fibreboard Corp., 178 F.3d 316, 319, 328
(5th Cir. 1999) 18, 24

Jackson v. Johns-Manville Sales Corp., 781 F.2d 394
(5th Cir.) (en banc), *cert. denied*, 478 U.S. 1022 .. 18

Lee v. United States, 629 F. Supp. 721
(D. Alaska 1986) 8, 13

Lehman v. Nakshian, 453 U.S. 156, 161 (1981) 12

Leisnoi v. United States, 170 F.3d 1188
(9th Cir. 1999) 8, 13

Leison, Inc. v. United States, 170 F.3d 1188
(9th Cir. 1999) 8

Lethin v United States, 583 F.Supp 863 (D.Or. 1984) . 20, 21

Lynch v. United States, 292 U.S. 571 (1934) 16

Madden v. Internal Revenue Service, 850 F. Supp. 148 (N.D.N.Y. 1994) 8, 13

McGuffy v. Weil, 125 So.2d 154 (1960) 22, 26

Ogden v. Police Jury of Concordia Parish, 28 F.Supp. 402 (W.B. La. 1939) 22

Orleans Levee Dist. v. Dept. of Natural Resources, 496 So. 2d 281 (La. 1986) 18

Orleans Parish School Bd v. Campbell, 132 So.2d 885 (1961) 20, 24

Perry v. United States, 294 U.S. 330 (1935) 16

Pugh v. United States, 418 F. Supp. 538 (E.D. Wis. 1976) 8, 13

Richmond, Fredericksburg & Potomac R. Co. v. United States, 945 F.2d at 765, 767 (4th Cir. 1991) 12

Selectmen of the Town of Nahant v. United States, 293 F.Supp. 1076 (D.Mass. 1968) 20

Simmons v. Bossier Levee District, 624 So.2d 935 (La. App. 2d Cir. 1993) at 953 26

State et rel. Lisso v. Police Jury of Red River Parish, 116 La 767, 41 So. 85, 86 (1906) 18

Texas Industries, Inc., v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) 17

Tournillon v. Sewerage & Water Bd. of New Orleans, 96-1457 (La. App. 4th Cir. 2/12/97) 689 So.2d 655 .. 26

United States Trust Co. v. New Jersey, 543 A.2d 457 (D.N.J. 1988) 20, 21

United States v. Baggerly, 524 U.S. 38 (1998) 12, 14

United States v. Bostwick, 94 U.S. 53 (1876) 16

United States v. National Exchange Bk. of Baltimore, MD, 270 U.S. 527 (1926) 16

United States v. Standard Oil Co., 332 U.S. 301, 308 (1947) 17

United States v. Winstar, 518 U.S. 839 (1996) 9, 16

Wheeldin v. Wheeler, 373 U.S. 647, 653 (1963) 17

STATUTES

28 U.S.C.A. § 1254 2

28 U.S.C.A. § 1291 1

28 U.S.C.A. § 1346 ..... 1, 2

28 U.S.C.A. § 1346(f) 10

28 U.S.C.A. § 2409a 2, 5, 6, 7, 8, 14, 15

42 U.S.C.A. §6201 4

Louisiana Civil Code Annotated article 1 19

Louisiana Civil Code Annotated article 1767. 21

Louisiana Civil Code Annotated article 493. ..... 29, 30

Louisiana Civil Code Annotated article 697 26

Louisiana Civil Code Annotated article 773 ..... 20, 21

Louisiana Civil Code article 1523 ..... 3, 24

Louisiana Civil Code article 1559 ..... 3, 20, 21, 27

Louisiana Civil Code article 3418 ..... 4, 29

Louisiana Civil Code article 493 4

Louisiana Civil Code article 645 3

Louisiana Civil Code article 730 ..... 3, 22, 27, 28

Louisiana Civil Code article 749 ..... 3, 27

Louisiana Civil Code article 751 4

U.S. Const. art. IV, § 1 ..... 3, 9, 16

OTHER

Yiannopoulas, Extinction of Predial Servitudes, 56
Tul.L.Rev. 1288 (1982) 13, 26, 28

OPINIONS AND ORDERS REPORTED

Lafargue. v. United States, 4 F. Supp. 2d 580 (E.D. La. 1998), *aff'd*, 193 F.3d 516 (5th Cir. 1999), *reh'g denied* (October 13, 1999). (The Fifth Circuit opinions were not released for publication.)

JURISDICTIONAL BASIS

Pursuant to Supreme Court Rule 14(e), petitioners state that jurisdiction lies in this Court by virtue of the following:

I. Date Judgment or Order Sought to be Reviewed was Entered

On July 31, 1997, the petitioners filed a class action complaint against the United States of America and Louisiana Intrastate Gas Company pursuant to the Quiet Title Act, 28 U.S.C.A. § 2409a, seeking to quiet title a servitude petitioners donated to the United States. The complaint alleged jurisdiction pursuant to 28 U.S.C.A. § 1346(f). On May 27, 1998, the district court granted the defendants' motion for summary judgment holding that "the Government has maintained ownership of the servitudes and the Pipeline continuously since 1979." 4 F. Supp. 2d 580 (E.D. La. 1998), *aff'd* 193 F.3d 516 (5th Cir.); *reh'g denied* (October 13, 1999). Petitioners appealed the summary judgment, pursuant to 28 U.S.C.A. § 1291, which was affirmed on August 16, 1999, by the United States Court of Appeals for the Fifth Circuit. *See*, Appendix A.

II. Date of Orders Respecting Rehearing

A petition for rehearing and rehearing *en banc* was filed by petitioners and subsequently denied by the Fifth Circuit on October 13, 1999. *See*, Appendix C.

III. Petitioners do not rely on Rule 12.5.

IV. Statutory Provisions Believed to Confer on this Court Jurisdiction to Review on a Writ of Certiorari the Judgment or Order in Question

This Court has jurisdiction to review the judgment and orders in question pursuant to 28 U.S.C.A. § 1254, which states, "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]"

V. This provision is not applicable to this proceeding.

CONSTITUTIONAL PROVISIONS AND STATUTES PRIMARILY RELIED UPON

1. **28 U.S.C.A. § 1346 - United States as Defendant.**

   . . . The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

2. **28 U.S.C.A. § 2409a - Real Property Quiet Title Actions.** (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights.

3. **28 U.S.C.A. § 2409a(e) - Disclaimer.** . . . If the United States disclaims all interest in the real property or interest therein adverse to the Plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the

civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

4. **U.S. Const. art. IV, § 1 - Full Faith and Credit.**

   Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

5. **Louisiana Civil Code article 1523 - Gratuitous, Onerous and Remunerative Donations; Definitions.** There are three kinds of donations *inter vivos*: . . . The onerous donation, or that which is burdened with charges imposed on the donee

6. **Louisiana Civil Code article 1559 - Causes for Revocation or Dissolution.** [Donations] *inter vivos* are liable to be revoked or dissolved on account of . . . the non-performance of the conditions imposed on the donee

7. **Louisiana Civil Code article 645 - Regulation of Servitude.** A right of use is regulated by application of the rules governing usufruct and predial servitudes to the extent that their application is compatible with the rules governing a right of use servitude.

8. **Louisiana Civil Code article 749 - Extent and Manner of Use of Servitude When Title is Silent.** If the title is silent as to the extent and manner of use of the servitude, the intention of the parties is to be determined in the light of its purpose.

9. **Louisiana Civil Code article 730 - Interpretation of Servitude.** Doubt as to the existence, extent, or manner of exercise of a predial servitude shall be resolved in favor of the servient estate.

10. **Louisiana Civil Code article 751**. A predial servitude is extinguished by the permanent and total destruction of the dominant estate...

11. **Louisiana Civil Code article 3418 - Abandoned Things**. One who takes possession of an abandoned thing with the intent to own it acquires ownership by occupancy. A thing is abandoned when its owner relinquishes possession with the intent to give up ownership.

12. **Louisiana Civil Code article 493 - Ownership of Improvements**. . . . When the owner of buildings, other constructions permanently attached to the ground, or plantings no longer has the right to keep them on the land of another, he may remove them subject to his obligation to restore the property to its former condition. If he does not remove them within 90 days after written demand, the owner of the land acquires ownership of the improvements and owes nothing to their former owner.

STATEMENT OF THE CASE

I. Factual Background

In 1975, in response to artificial oil shortages created by the Organization of Petroleum Exporting Countries (OPEC), Congress enacted the Energy Policy and Conservation Act ("EPCA")[1] for the purpose, among other things, of creating a Strategic Petroleum Reserve Program("SPRP"). The SPRP was intended to serve as a reserve of up to one billion barrels of petroleum products to reduce the impact of energy supply interruptions or reductions in imports of crude oil and refined petroleum products.

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[1]42 U.S.C.A. §6201, et seq.

Pursuant to its authority under EPCA, the government accepted numerous servitudes donated by petitioners and other patriotic landowners in Louisiana for the express purpose of constructing, operating and maintaining a 67-mile, 36-inch pipeline, to run between SPRP storage facilities at Weeks Island, Louisiana, and a terminal in St. James Parish. The donations were made with the express purpose of allowing the government to construct, operate and maintain a pipeline for the transportation and storage of oil in connection with the SPRP. *See*, Appendix E.

In 1994, when it was determined that the Weeks Island storage facility was geophysically unstable for the storage of natural oil, the government decided to decommission the facility and sell the pipeline to the Louisiana Intrastate Gas Company ("LIG"). *See*, Appendix D. Before suit was filed, LIG agreed to purchase the pipeline and convert it for the transportation of natural gas for profit. It is undisputed that the pipeline would no longer be used for the SPRP. Petitioners contend that, when the government ceased to use the donation for the purpose for which it was donated, petitioners had the right under the terms of the servitude and the Louisiana Civil Code to claim revocation of the servitude and the pipeline.

II. Course of Proceedings and Disposition in the Court Below

Petitioners filed suit on July 31, 1997, under the Quiet Title Act, 28 U.S.C.A. § 2409a, ("QTA") against the United States and LIG seeking a judicial declaration that the rights-of-way (servitude) they granted to the United States for pipeline use in the 1970s had expired or terminated, and that ownership of the servitude and pipeline had reverted back to the donors/petitioners. On August 22, 1997, the government executed a quitclaim in favor of LIG pursuant to an agreement to sell that was executed prior to the filing of the complaint.

On November 19, 1998, after suit was filed , and before the actual commencement of trial, the United States filed a declaration disclaiming all interest in the subject property. Although the district court declined to confirm the disclaimer, on May 27, 1998, the district court granted summary judgment in favor of the government dismissing petitioners' complaint, holding that the government had maintained ownership of the servitude and pipeline continuously since 1979. Petitioners appealed to the U.S. Court of Appeals for the Fifth Circuit. (*See*, Appendix A.) The dismissal was affirmed by the Fifth Circuit. A petition for rehearing and rehearing *en banc* was timely filed but was denied by the Fifth Circuit on October 13, 1999, with written reasons. (*See*, Appendix C.)

SUMMARY OF ARGUMENT

The district court lacked jurisdiction under the QTA because the United States disclaimed all interest in the rights-of-way that had been granted by the petitioners in the donation. By its express terms, the QTA provides that federal jurisdiction shall cease "[i]f the United States disclaims all interest in the real property or interest therein adverse to plaintiffs at any time prior to the actual commencement of the trial." 28 U.S.C.A. § 2409a(e).

Here, the United States disclaimed all such interest prior to the commencement of the trial when it filed a formal disclaimer with the district court. The district court improperly held that confirmation under the QTA was discretionary and, since the court believed that the disclaimer was in bad faith, it declined to confirm the disclaimer. On appeal, the Fifth Circuit rejected the district court's finding of bad faith[2] but nevertheless held

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[2]*See*, Appendix A at A-4. In the district court, petitioners contended that the disclaimer was in bad faith. Petitioners do not

that confirmation was discretionary. The Fifth Circuit then concluded that, despite the express language of section 2409a(e) of the QTA, which allows the government to disclaim and divest the court of jurisdiction at any time prior to the commencement of trial, the disclaimer would nevertheless be governed by the general principle that jurisdiction should be determined on the facts as they existed when the complaint was filed. Id. at 4. Having concluded that the court had subject matter jurisdiction, the Fifth Circuit went on to apply federal and common law principles to a civil law property dispute controlled exclusively by the Louisiana Civil Code and held that an express reversionary clause was necessary for the pipeline and servitude to revert back to the petitioners.

It is the contention of petitioners that the government's disclaimer divested the district court of its subject matter jurisdiction and the district court had no discretion to refuse to confirm the disclaimer by the United States pursuant to section 2409a(e) of the QTA. Even if the court somehow retained jurisdiction, when the United States steps down from its position of sovereignty and enters into a contract with private Louisiana citizens, the QTA cannot shield the government from the Louisiana Civil Code that governs the donations and servitudes involved in this matter. The Louisiana Civil Code, unlike the common law, vests in the donor the right to claim a revocation of a servitude donated to the United States when the government ceases using the servitude for the purpose for which the donation was made, without the necessity of an express reversionary clause.

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challenge the Fifth Circuit's finding that the disclaimer was valid and made in good faith. Rather, it is the contention of petitioners that a valid and good faith disclaimer divested the court of jurisdiction.

ARGUMENT

I. Grounds for Granting Writ of Certiorari

A. The decision by the United States Court of Appeals for the Fifth Circuit in the underlying case is contrary to the express language of section 2409a(e) of the QTA and every district and federal appellate court that has construed section 2409a(e). In particular, the Fifth Circuit's application of the general principle that jurisdiction should be determined on the facts as they existed when the complaint was filed is contrary to the express language of section 2409a(e), which provides that the jurisdiction of the district court ceases upon the filing of a disclaimer at any time prior to the commencement of trial. The Fifth Circuit's application of this general principle of jurisdiction in an action under the QTA is not only contrary to the express language of the QTA but is contrary to every case construing section 2409a(e). *See*, Lee v. United States, 629 F. Supp. 721 (D. Alaska 1986); Madden v. Internal Revenue Service, 850 F. Supp. 148 (N.D.N.Y. 1994); Pugh v. United States, 418 F. Supp. 538 (E.D. Wis. 1976); Leison, Inc. v. United States, 170 F.3d 1188 (9th Cir. 1999); Bily v. Illinois Central Gulf Railroad Co., 637 F. Supp. 127 (N.D. Ill. 1986).

B. The decision by the U.S. Court of Appeals for the Fifth Circuit that confirmation of a disclaimer is discretionary and not ministerial is not only contrary to section 2409a of the QTA (hereinafter referred to as "Section 2409a") but also contrary to the decisions of all federal courts that have construed the confirmation provisions of Section 2409a(e). *See*, Madden, 850 F. Supp. 148; Pugh, 418 F. Supp. 538; Lee, 629 F. Supp. 721; Block v. North Dakota, 461 U.S. 273 (1983); Leisnoi v. United States, 170 F.3d 1188 (9th Cir. 1999).

C. The U.S. Court of Appeals for the Fifth Circuit's interpretation of the QTA as a basis for applying federal "common law" principles to a state civil law property dispute controlled exclusively by the Louisiana Civil Code is in direct conflict with the U.S. Supreme Court's decision in United States v. Winstar, 518 U.S. 839 (1996), the Erie Doctrine, 304 U.S. 64, and the Full Faith and Credit Clause of the U. S. Constitution, U.S. Const. art. IV, § 1, and is so far departed from the accepted and usual course of judicial proceedings that it calls for this Court's supervisory power.

D. The Fifth Circuit's failure to apply the Louisiana Civil Code to a civil law property dispute under the QTA violates the Louisiana Constitution and the Full Faith and Credit Clause of the U.S. Constitution, U.S. Const. art. IV § 1. When applying Louisiana law, the Louisiana Civil Code provides the only applicable substantive law. In Louisiana, jurisprudence is not substantive law, but rather, interpretation of the Louisiana Civil Code.

II. The District Court Lacked Jurisdiction over Petitioners' QTA Claim Because the United States Disclaimed All Interest in the Subject Property.

A. The Quiet Title Act. It is axiomatic that the United States may not be sued without the consent of Congress, and the conditions Congress places on a waiver of federal sovereign immunity must be strictly construed. *See*, Block, 461 U.S. 273 at 287. In the instant case, petitioners filed suit against the United States and LIG seeking quiet title to a servitude donated to the government for the express purpose of constructing, operating and maintaining a pipeline to transport and store oil for the SPRP. Suit was filed against the United States pursuant to the QTA, which provides that "[t]he United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the

United States claims an interest[.]" 28 U.S.C.A. § 2409a. The QTA is the "exclusive means by which adverse claimants [may] challenge the United States' title to real property." Block, 461 U.S. 273 at 286[3] and operates as a waiver of the sovereign immunity of the United States.

The QTA also confers jurisdiction on a federal district court to hear an action "to quiet title to an estate or interest in real property in which an interest is claimed by the United States." 28 U.S.C.A. § 1346(a). By its terms, the waiver of sovereign immunity and the jurisdiction conferred on the district court in the QTA are conditioned on the existence of a present claim of interest by the United States in the real property at issue. When the government's interest in the property is extinguished or terminated, the waiver of sovereign immunity and the jurisdiction of the court cease to exist under Section 2409a(e), which provides:

> If the United States disclaims all interest in the real property or interest therein adverse to the Plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease . . .

28 U.S.C.A. § 2409a(e).

When the United States has disclaimed all right, title, or interest in the real property "prior to the actual commencement of the trial," as is the case here, the federal district court's jurisdiction over the QTA claim ceases. Id.

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[3]The United States district courts have exclusive original jurisdiction over QTA claims. 28 U.S.C.A. § 1346(f).

B. The Disclaimer. In the instant case, before suit was filed, the United States had agreed to execute a quitclaim deed in favor of LIG. *See*, Appendix A at A-15. On August 22, 1997, after suit was filed and pursuant to the agreement to sell its interest to LIG that was entered in to before suit was filed, the United States sold and conveyed to LIG "as is" and "where is" under a quitclaim deed, all title, right, and interest the government had in the pipeline and the accompanying rights-of-way for a total sum of $22 million. *See*, Appendix A at A-3. Thereafter, on or about November 19, 1998, the United States filed a declaration with the district court in which it formally disclaimed any interest in the property at issue. Id. The record before the district and appellate court, clearly established that the United States had affirmatively disclaimed all interests in the pipeline and the rights-of-way. The QTA's limited waiver of sovereign immunity accordingly was not applicable, and the district court should have entered an order of confirmation and dismissed the lawsuit for lack of subject matter jurisdiction.

C. General Principles of Jurisdiction are not Applicable to the QTA. When the United States filed a formal disclaimer, the district court refused to confirm the disclaimer, finding the government's actions disingenuous. On appeal, the Fifth Circuit rejected the district court's finding of bad faith and "accepted the government's contention that the sale of the pipeline was not in response to the suit." Appendix A at a-4. However, despite finding a good faith disclaimer by the government and the clear mandate of Section 2409a(e), the court erroneously held that it, nevertheless, had jurisdiction over the quiet title action on the grounds that jurisdiction should be determined on the facts as they existed at the time the complaint was filed. Id. *citing* Delta Savings & Loan v. IRS, 847 F.2d 248 (5th Cir. 1988), and Bank of Hemet v. United States, 643 F.2d 661 (9th Cir. 1981).

Under Section 2409a(e), the government may divest the court of jurisdiction by filing a disclaimer at any time prior to the actual commencement of the trial. A plain reading of the QTA statute provides an exception to the general rule for determining a court's jurisdiction. Clearly the QTA provides the government with a vehicle to re-assert its immunity once the government has filed a disclaimer and abandoned or voluntarily waived any interest in the property, which is the subject of the quiet title action. Once the government's immunity is reinstated, the court can no longer maintain jurisdiction over a sovereign or the claim unless there is some other independent basis to establish jurisdiction which does not exist here. The conditions placed by Congress on the waiver granted by the QTA are jurisdictional prerequisites which are "to be construed narrowly in favor of the government." Richmond, Fredericksburg & Potomac R. Co. v. United States, 945 F.2d at 765, 767 (4th Cir. 1991). The QTA's waiver of sovereign immunity, "must be strictly observed and exceptions thereto are not to be implied." Lehman v. Nakshian, 453 U.S. 156, 161 (1981). The QTA clearly provides the court with no discretion to reject a disclaimer on any grounds and is clearly an exception to the general rule for determining jurisdiction. *See*, United States v. Baggerly, 524 U.S. 38 (1998).

The Fifth Circuit's contrary reading of Section 2409a(e) expands the QTA's waiver of sovereign immunity in conflict with the rules governing waivers of sovereign immunity. It erroneously precludes the United States from disclaiming any interest in property after a complaint is filed, even though section 2409a(e) expressly permits a disclaimer to be filed "at any time prior to the actual commencement of trial." Gardner v. Stager, 103 F.3d 886, 887 (9th Cir. 1996).

D. The Court Has No Discretion to Refuse Confirmation of a Disclaimer. In failing to confirm the government's disclaimer, the Fifth Circuit found that "the language of the disclaimer provision manifests congressional intent to provide the court with some flexibility in applying the provision." *See*, Appendix A at A-3. The Fifth Circuit's interpretation of the language of the disclaimer provision of the QTA was error. The Fifth Circuit does not cite, and petitioners have found no authority to support, the lower court's contention that Congress intended there to be any flexibility by the courts in their obligation to confirm valid disclaimers filed under the QTA. On the contrary, the Fifth Circuit is the only court to conclude that confirmation of a disclaimer is discretionary rather than a ministerial act.[4]

In Lee, 629 F.Supp. 721, following a conveyance of disputed land, the government filed a disclaimer of all interest in the lands and the court found, "There is no question that its [the government's] disclaimer is valid . . . Therefore, this court must confirm the disclaimer . . . since no trial has yet commenced in this action, under the terms of section 2409a(d), this court's jurisdiction must cease." Id. at 726. Similarly, in Pugh, 418 F. Supp. 538, the government sold property by quitclaim deed, followed by filing a disclaimer, the court held that confirmation of the disclaimer was "a formality and one which this court should not deny," thereby divesting the court of jurisdiction." Id.[5]

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[4]*But see*, Leisnoi, 170 F.3d 1188 at 1191. The district court refused to confirm the governments disclaimer which was filed contemporaneously with the governments answer, on the grounds that the "court lacked initial subject matter jurisdiction."

[5]*See also*, Madden, 850 F.Supp. 148 at 151. "Confirmation of a disclaimer filed by the United States is deemed a formality and

Section 2409a(e) expressly provides that federal jurisdiction under the QTA ceases when the United States disclaims its interest in property, and the disclaimer "is confirmed by order of the court." 28 U.S.C.A. § 2409a(e). The district court's role in this context is to formalize, by court order, the disclaimer filed by the United States so that the disclaimer may be relied upon by others. The statute provides the district court with no discretion to reject a valid disclaimer on any grounds. *See, e.g.,* Baggerly, 524 U.S. 38 (equitable tolling is incompatible with the terms of the QTA). As there was no other jurisdictional basis for the QTA claims, the district court should have confirmed the disclaimer and dismissed the QTA claims for lack of subject matter jurisdiction. As the dissent in the Fifth Circuit's opinion correctly noted, "we must conceptualize confirmation as a ministerial function and not a discretionary function of the district court." Appendix A at A-16.

E. The Fifth Circuit's Reliance on *Delta Savings* and *Bank of Hemet* was Misplaced. The district court and the Fifth Circuit's reliance on Delta Savings, 847 F.2d 248, and Bank of Hemet, 643 F.2d 661, was misplaced because those cases are clearly distinguishable. In both Delta Savings and Bank of Hemet, the IRS held a lien on the property at issue and the claims to quiet title arose from attempts to resolve competing liens on the subject property. Section 2409a , however, provides that the United States may be named as a party in an action to adjudicate "disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C.A. § 2409a(e). Since the interests claimed by the IRS prior to sale of the

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one which this court should not deny." As such, this court's jurisdiction ceased at this point.

property were security interests, Section 2409a(e) was not applicable.

In addition, even if federal jurisdiction had existed under Section 2409a, both Delta Savings and Bank of Hemet are distinguishable from the present case because those cases did not involve a formal disclaimer of governmental interest under Section 2409a(e). Instead, in both Delta Savings and Bank of Hemet, the government argued that the district court never had jurisdiction in the first instance under Section 2409a(e) because the government had sold the property at issue before being served with the complaint.[6] The absence of a formal governmental disclaimer in both Delta Savings and Bank of Hemet meant that the courts in those cases did not address the application of Section 2409a(e). Accordingly, the opinion of the Fifth Circuit should be vacated and the case remanded to the district court to confirm the disclaimer in accordance with the QTA.

III. The QTA Cannot Shield the United States from Louisiana Civil Code Which Supplies the Applicable Rule of Law.

In the instant case, petitioners contend that the servitude they donated to the United States for the construction, operation and maintenance of a pipeline to transport and store oil in connection with the SPRP terminated and reverted back to the petitioners when the government ceased using the pipeline for SPRP and sold it to LIG for the transportation of natural gas for profit. The Fifth Circuit erroneously rejected petitioners' contention and held that an express reversionary

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[6]As noted, the government might have also argued that jurisdiction was improper because Section 2409a does not apply when the interest originally claimed by the United States is a security interest. *See*, 28 U.S.C.A. § 2409a.

clause was necessary for the servitude to terminate and revert back to the donors when the government stopped using the pipeline for the purpose for which it was granted.

In reaching its decision, the Fifth Circuit concluded that the QTA required the application of both federal and common law principles to a civil law property dispute arising exclusively within the state of Louisiana.[7] The Fifth Circuit's reasoning and holding is in direct conflict with the Louisiana Civil Code and the Supreme Court's holding in Winstar, 518 U.S. 839, the Erie Doctrine, 304 U.S. 64, and the Full Faith and Credit Clause of the U. S. Constitution, U.S. Const. art. IV, § 1, and should be reversed.

When the United States steps down from its position of sovereignty and enters into a contract with private individuals, the QTA cannot shield the government from the same state laws that govern contracts between private citizens. Id. According to the U.S. Supreme Court in Winstar, the United States is to be treated as any other private party in contractual dealings, and therefore its interests in contracts which it enters into are subject to state law just as any private party's interests are.[8]

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[7]*See*, Appendix A at A-7, citing Bank One of Texas v. United States, 157 F.3d 397, 403 (5th Cir. 1998), *cert. denied*, 119 S.Ct. 1761 (1989).

[8]Id. *See also*, Cooke v. United States, 91 U.S. 389 (1875); United States v. Bostwick, 94 U.S. 53 (1876); Lynch v. United States, 292 U.S. 571 (1934); Perry v. United States, 294 U.S. 330 (1935); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); United States v. National Exchange Bk. of Baltimore, MD, 270 U.S. 527 (1926).

In Erie Railroad Co., v. Tompkins, 304 U.S. 64 (1938), the Supreme Court announced the governing principle that was to become the heart of the Erie Doctrine:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Id. at 78.

Nevertheless, in limited areas, the court has recognized the authority to formulate what has come to be known as "federal common law." *See*, United States v. Standard Oil Co., 332 U.S. 301, 308 (1947); Texas Industries, Inc., v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981). However, the instances are "few and restricted and fall into two categories: those in which a federal rule of decision is 'necessary to protect uniquely federal interests,' and those in which Congress has given the courts the power to develop substantive law." Id. at 640-41. *See also,* Wheeldin v. Wheeler, 373 U.S. 647, 653 (1963). "The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law." Texas Industries, 451 U.S. 630 at 640-41.

The QTA contains no pronouncement by Congress authorizing the courts to develop substantive law nor is there a

"uniquely federal interest," Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964), in this action to quiet title to disputed property in the State of Louisiana. On the contrary, the State of Louisiana has an overriding interest in the disposition of property located solely within its borders. Therefore, the civil law of Louisiana should have been employed in resolving the disputed title, and not federal common law as applied by the lower courts.

When the underlying substantive rule involved is based on state law, the federal court must due what it thinks the state's highest court would deem best and not what the federal court thinks best. *See,* Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir.) (en banc), *cert. denied*, 478 U.S. 1022. In interpreting the laws of the State of Louisiana, a federal court must step into the role of Louisiana judges who are called upon to think and act as civil-law jurists when deciding cases under the Louisiana Civil Code, and not as judges in the Anglo-American tradition who are more often engaged in the interpretation and application of law derived from common law principles and sources outside the ambit of the civil code. *See,* Hulin, 178 F.3d 316 at 319, 328.

Under Louisiana's Constitution and the Louisiana Civil Code, the power to make substantive laws is vested exclusively in the legislature. Louisiana courts cannot make law but are bound to decide cases according to their best understanding of the law established by legislation and custom.[9] Under the

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[9]*See*, Orleans Levee Dist. v. Dept. of Natural Resources, 496 So. 2d 281 (La. 1986) at 286; cf. State et rel. Lisso v. Police Jury of Red River Parish, 116 La 767, 41 So. 85, 86 (1906) ("[It is not, and cannot, reasonably, be asserted, that the judiciary department is vested with the slightest shadow of authority in the matter of making laws; its sole function being to interpret the laws, as made[.]") Id.

Louisiana Civil Code, legislation and custom are the only authoritative sources of law.[10] Jurisprudence, doctrine, conventional usages, and equity are merely persuasive sources of law. In the instant case, the applicable Louisiana Civil Code articles governing donations and servitudes and the cases construing them, clearly mandate that the servitude donated to the United States for the establishment of the SPRP terminated and reverted back to the petitioners when the government stopped using the pipeline for the SPRP.

IV. The Fifth Circuit's Failure to Apply the Louisiana Civil Code Violates *Winstar*, the Erie Doctrine, the Full Faith and Credit Clause of the U.S. Constitution.

The Fifth Circuit held that petitioners' donation must include an express provision for termination or revocation if it was to terminate and revert back to the donors upon a change in use of the pipeline from the establishment of the SPRP to the commercial transportation of natural gas by LIG. In reaching its conclusion, the Fifth Circuit erroneously relied on federal principles and the common law of New Jersey, Massachusetts and Oregon to resolve a civil law property dispute arising solely within the State of Louisiana.

Although petitioners' donation enumerates four causes for termination, those causes are not exclusive. Indeed, the petitioners' donation states that "the causes for termination of this easement shall include but not be limited to the following: (a) abandonment, (b) removal of the pipeline, (c) ten years non-use, or (d) execution of an affidavit stating that the pipeline has been abandoned." In addition to the causes of termination listed above, the Louisiana Civil Code provides several other means of extinguishing a donation or servitude. According to

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[10]La. Civ. Code Ann. art. 1 (West 1999).

traditional civilian law concepts, a donation of servitude is extinguished: 1) when it can no longer be used for the purpose for which it was donated;[11] 2) upon the happening of a resolutory condition;[12] or 3) the impossibility of use.[13] However, the Fifth Circuit ignored the Louisiana Civil Code and relied on the common law of New Jersey, Massachusetts and Oregon to support its decision.

A. The Common Law of New Jersey, Massachusetts and Oregon Have Nothing in Common With The Louisiana Civil Code. The Panel Opinion relied on three cases from New Jersey, Massachusetts and Oregon.[14] In those cases, property interests were conveyed to the United States for the express purpose of establishing life-saving stations.[15] In all three cases, the court rejected the petitioners' claims that the conveyances terminated and the property reverted to the grantors when the purpose or use for the conveyances changed. The Panel agreed with the common law court's reasoning in each of the three cases stating:

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[11]La. Civ. Code Ann. art. 1559 (West 1999); Orleans Parish School Bd v. Campbell, 132 So.2d 885 (1961).

[12]La. Civ. Code Ann. art. 773 (West 1999); Guzzetta v. Pipeline Co., 485 So.2d 508 (La. 1986).

[13]Yiannopoulas, Extinction of Predial Servitudes, 56 Tul.L.Rev. 1288 (1982).

[14]*See*, United States Trust Co. v. New Jersey, 543 A.2d 457 (D.N.J. 1988) at 459; Lethin v United States, 583 F.Supp 863 (D.Or. 1984) at 865-66; Selectmen of the Town of Nahant v. United States, 293 F.Supp. 1076 (D.Mass. 1968) at 1077.

[15]United States Trust Co., 543 A.2d at 459; Lethin, 583 F.Supp at 865-66; Town of Nahant, 293 F.Supp. at 1077.

> In two of the cases, the courts reasoned that "[t]he mere recital in the deed of the purpose for which the land conveyed was to be used is not in itself sufficient to impose any limitation or restriction on the estate granted."[16] In the third case, the court reasoned that "[d]eed language alleged to create a determinable fee is strictly construed, to avoid a forfeiture," and declined "to construe the language of purpose contained in this deed as an expression of intent to return the property to the grantor when the purpose has been exhausted or satisfied."[17] We essentially agreement with the reasoning of these cases.[18]

While these three cases may be valid in common law jurisdiction, they are contrary to Louisiana Civil Code. For example, while the common law may require a reversionary provision to be expressly stated,[19] the Louisiana Code does not require one for donations or servitudes.[20] Furthermore, while the common law may strictly construe an instrument to avoid a forfeiture,[21] the Civil Code resolves any doubt in the

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[16]Lethin, 583 F.Supp. at 871, *quoting* Town of Nahant, 293 F.Supp. at 1078.

[17]United States Trust Co., 543 A.2d at 462.

[18]Appendix A at A-12.

[19]Lethin, 583 F.Supp. at 871.

[20]La. Civ. Code Ann. arts. 1559, 773 and 1767 (West 1999).

[21]United States Trust Co., 543 A.2d at 459.

interpretation of a servitude agreement in favor of the landowners and against the existence of a servitude.[22]

B. When a Donor Has Imposed Conditions Upon The Donee There Is No Necessity For an Express Stipulation of a Reverter Clause. In addition to relying on common law jurisprudence, the Panel also relied on dicta in the Louisiana appellate decision in Heirs of Primeaux v. Erath Sugar Company, 484 So.2d 717 (La. Ct. App. 1986), which had effectively been overruled.

Primeaux is not a valid statement of Louisiana law as applied to these facts. The Primeaux court cited a federal district court decision from 1939 as authority for its statement that an express reversionary clause was required. *See*, Heirs of Primeaux, 484 So.2d at 721, *citing* Ogden v. Police Jury of Concordia Parish, 28 F.Supp. 402 (W.B. La. 1939). The Ogden court, in turn, relied on the Louisiana Supreme Court decision in Board of Trustees of Ruston Circuit v. Rudy, 187 So.2d 549 (La. 1939).

However, in Board of Trustees of Columbia Road Methodist Episcopal Church of Bogalusa v. Richardson,44 So.2d 321 (1949), the Louisiana Supreme Court held that the Rudy decision was an invalid statement of Louisiana law. The Richardson court stated:

> In the case of Board of Trustees of Ruston Circuit, M.E. Church, South v. Rudy . . . the Court . . . observed: "It has been held that where the donor does not place such a reservation in the act of donation, the donee is granted a complete title" and concluded that inasmuch as the act whereby Rudy donated certain

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[22]La. Civ. Code Ann. art. 730 (West 1999); McGuffy v. Weil, 125 So.2d 154 (1960).

> property to the church did not contain such a reversionary clause, the title was completely vested in the church by the first deed and that the stipulation that it was 'to be used for religious purposes' was merely indicative of the motive for making the donation. This holding is not only at variance with our civil law, as herein above demonstrated, but it is also not supported by the authorities relied on by the author of the opinion and we will not, therefore, follow it.

Id. at 325 (emphasis added). Thus, the court held that the donees did not have the right to dispose of the property or use the property "for any other purpose than that stated in the act of donation." Id.

The Louisiana Supreme Court further dispelled any doubt as to the controlling rule of law in this case in Campbell, 132 So.2d 885. In that case, there was a donation of property to the City of New Orleans for public school purposes, but the donative act contained no express right of reversion. When the property ceased to be used for public school purposes, the heirs of the donor made formal demand for the return of the property. The court held that the conveyance was an onerous donation because the donor placed "a charge upon the donee that [the property is] to be used for public school purposes," and therefore "subject to revocation or dissolution on account of the non-performance of the conditions imposed by the donor." Id. at 888. Since the property was no longer being used for public school purposes, the heirs of the donor were entitled to have the donation revoked. Id. at 899.

The court also addressed the argument that revocation was improper because the donation did not contain an express stipulation of the right of reversion, as required by the Rudy case:

> The controlling authority in this subject is Board of Trustees of Columbia Road Methodist Episcopal Church v. Richardson, 44 So. 2d 321, 325. In that matter, which involved the revocation of a donation of land for church purposes by reason of the donee's discontinuance of the use for which the land was donated, we reconsidered our ruling in the Rudy case and refused to follow it.[23]

Finally, the Campbell court made unmistakable the applicable rule of law in these situations as follows, "When the donor has imposed charges upon the donee there is no necessity for an express stipulation of a reverter clause as the Civil Code (article 1559) vests in the donor the right to claim a revocation for failure of the donee to comply with the conditions of the gift." Campbell, 132 So.2d 885. The Louisiana Supreme Court has spoken on the issue, effectively overruling Primeaux, and therefore, reliance by the Panel on the lower court's decision was reversible error.[24]

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[23]Id. at 890. The court noted that the only time an express reservation is required for a right of reversion is when property has been "dedicated to public use." There is no question here that a donation is at issue rather than a dedication for public use and no one has contended that the Petitioners' donation constitutes a dedication for public use. Rather, this is an onerous donation as defined by LSA--C.C. art. 1523.

[24]When a state's highest court has spoken on an issue, the lower court's decision is not controlling and therefore a federal court must rely on the pronouncement of the high court. *See,* Hulin, 178 F.3d 316 at 319.

C. The Donation Was Made for the Express Purpose of Constructing, Operating and Maintaining an SPRP Oil Pipeline. On rehearing, the Fifth Circuit attempted to distinguish Richardson and Campbell claiming that "the donation in those cases placed an express condition or charge on the donee," while the petitioners' donation did not. In reaching its conclusion, the Fifth Circuit not only ignored the relevant Louisiana Civil Code articles that govern this issue, but disregarded its original opinion that found that the petitioners' donation was made for the express purpose of constructing a pipeline for the establishment of the strategic petroleum reserve. In particular, the Fifth Circuit quoted the following provisions of the donation as evidence of its purpose:

> [W]e by this act, do donate unto the UNITED STATES a right-of-way *for the . . . operation . . . of a single pipeline in the establishment, management, and maintenance of the Strategic Petroleum Reserve* . . .
>
> * * *
>
> The aforementioned servitude is acquired by the United States *for and in connection* with the *Strategic Oil Storage* program.
>
> * * *
>
> This donation is *made and accepted for and in consideration* of Grantor's desire to aid their country in the *establishment of a Strategic Petroleum Reserve and* in further *consideration* of Grantee's agreement to construct and *operate said pipeline*.

Appendix E at 5.

Despite finding that the cause, consideration and purpose of the donation was the construction, operation and

maintenance of a pipeline for the SPRP, on rehearing the Fifth Circuit declared that there was no charge or condition placed on the donee. Such interpretation was not only inconsistent with the clear expressed language of the donation but contrary to the Louisiana Civil Code.

Generally, the use and extent of servitudes are determined by the intentions of the parties as expressed in the terms and conditions of the agreement. *See*, McGuffy, 125 So.2d 154 at 157. When the agreement is silent as to certain terms and conditions, servitudes are regulated by the provisions of the Louisiana Civil Code. *See*, La. Civ. Code Ann. art. 697 (West 1999) and comment (b) to article 740; *see also*, Dautreuil v. Degeyter, 436 So.2d 614 (La. App. 3d Cir. 1983) at 617; Yiannopoulos, Predial Servitudes: Creation by Title, 45 Tul. L.Rev. 459 (1971).

Article 749 of the Louisiana Civil Code provides that where the servitude agreement is silent as to the extent of the use of the servitude, "the intention of the parties is to be determined in light of its purpose". La. Civ. Code Ann. art. 749. In other words, where the act creating the servitude is silent as to the scope and use of the servitude, the purpose for the servitude controls. *See generally,* Simmons v. Bossier Levee District, 624 So.2d 935 (La. App. 2d Cir. 1993) at 953; Tournillon v. Sewerage & Water Bd. of New Orleans, 96-1457 (La. App. 4th Cir. 2/12/97) 689 So.2d 655.

The court below erred in its conclusion that the language of the petitioners' donation evidences no intent to restrict the use of the donation solely to the SPRP. As indicated above, the petitioners' donation and time again shows the intention of the parties to limit the easement to the use of a pipeline to transport oil for the purposes of the SPRP.

In Simmons, the court applied Louisiana Civil Code article 749 to limit the use of a servitude according to its stated purpose. 624 So.2d 935 at 953. The stated purpose of the servitude was an easement for utilities and drainage. The court stated, "The titles to these drainage servitudes are silent as to the extent and manner of the servitude's use. There is no evidence in this record suggesting that the servitudes were intended for anything other than drainage canals and ordinary maintenance thereof. The dredging activities here clearly exceeded ordinary maintenance . . ." Id. By the same token, in this case, the servitude clearly states its purpose was for use by the government to implement the SPRP. There is no language that allows the government to use the servitude and pipeline for any use or purpose other than the SPRP; therefore, the use of the servitude and pipeline for LIG's commercial purposes in the transportation of natural gas for profit clearly exceeds the scope of the petitioners' donation.

Nowhere is there expressed any intent that the servitude be used other than for the SPRP. The court appears to require that words of limitation be stated in a certain way. However, just as Louisiana Civil Code article 1559 does not require an express reversionary clause to cause a donation to revert back to the donor if the purpose of the donation ceases to exist, Louisiana Civil Code article 749 does not require any limitation on the scope of an easement to be stated in any particular way. Rather, if the extent of the scope is unclear in the agreement or title, reference must be made to the purpose of the servitude to determine its manner of use and extent. In the instant case, the purpose was clearly stated in the agreement and required the government to construct, operate and maintain a pipeline for the SPRP. Furthermore, and perhaps more importantly, Louisiana Civil Code article 730 requires that any doubt as to the interpretation of the servitude must be construed

in favor of the landowner/petitioners. La. Civ. Code Ann. art. 730 (West 1999).

D. <u>Impossibility of Use: Decommissioning the Pipeline Extinguished the Servitude</u>. Louisiana law dealing with the termination of predial servitudes was summarized by professor A. N. Yiannopoulos as follows:

> The permanent and total impossibility of use is not specifically enumerated in the Code as a cause of the extinction of predial servitudes. However, impossibility of use may be regarded as a cause of extinction inferentially established by articles 647 and 751. Article 647, which establishes the principle of utility, requires that a predial servitude confer a benefit on the dominant estate. If there is no benefit "[t]here is no predial servitude." Obviously, when there is a permanent and total impossibility of use, a predial servitude is useless and no longer exists. According to article 751, the total and permanent destruction of the dominant or servient estate is a cause of extinction of a predial servitude. In such a case, a permanent and total impossibility of use of the servitude must necessarily exist.

56 Tul L.Rev. at 1288-89.

The use of the petitioners' donation for the purpose for which it was granted has become an impossibility. It is impossible to use the pipeline to transport crude oil to the Weeks Island Facility because the government has decommissioned the pipeline and because the Weeks Island Facility is no longer technologically capable of use for the

SPRP.[25] Thus, the pipeline is no longer part of the SPRP. The petitioners donated the servitude specifically for the purposes of the SPRP, which can no longer be accomplished. For this reason alone, the petitioners' donation of servitude has terminated.[26]

According to the terms of the servitude agreement, upon termination for any reason the government had only two choices: (1) remove the pipeline within one year or (2) abandon it in place. *See*, Appendix E at 8-9. If the pipeline was abandoned in place, the pipeline became the property of the landowners. Although the government initially had a choice, once the government decided to decommission the pipeline and sell it to LIG it eliminated its option to remove the pipeline. Since it sold whatever interest it had in the pipeline to LIG it gave up any right to remove the pipeline. As a result, the only option available to the government was abandonment in place.

Although the donation does not define or otherwise describe the factors which would constitute abandonment under the agreement, Louisiana Civil Code article 3418 states the requirements for abandonment as follows: (1) relinquishment of possession and (2) intent to give up ownership. More importantly, Louisiana Civil Code article 493 provides that the owner of a construction permanently attached to the ground may remove such construction once he no longer has the right

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[25]*See*, DOE News Release (Dec. 15. 1994), Record Excerpts, R. 1858-59; *See, also* DOE News Release (Jan. 29, 1996), R. 1440-41.

[26]*See*, Cascio v. DePaula, 27 So.2d 453 (La. App. 1st Cir. 1946) for an interpretation of a clause granting a donation made "for the cause of education." The court concluded that when the land is given for "education purposes", it reverts to the owners when a school built on the land is no longer used.

to keep it on the land of another. If he does not remove the construction within ninety days after written demand, the landowner acquires ownership of the construction. *See,* Guzzetta, 485 So.2d 508 at 511, *citing* La. Civ. Code Ann. art. 493. According to the complaint, petitioners made written demand for the removal of the pipeline and the government failed to remove it within the requisite 90 day period. Accordingly, petitioners are entitled to ownership of the pipeline either under the terms and conditions of the servitude agreement or under Louisiana Civil Code article art. 493 and should be placed in possession of the land and pipeline, which was the subject of the servitude agreement with the government.

CONCLUSION

For the foregoing reasons, petitioners request that the Court vacate the decision of the Fifth Circuit for lack of subject matter jurisdiction and remand the case to the district court to confirm the government's disclaimer. In the event the Court determines that it has jurisdiction over this matter, then petitioners request that the Court reverse the Fifth Circuit opinion and render judgment in favor of petitioners declaring that, when the government ceased using the servitude and pipeline for the purpose for which it was donated, ownership of the servitude and its improvements reverted back to petitioners.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-30657

JERON J. LAFARGLTE; SUSAN KYLE, on behalf of themselves and all others similarly situated; RONALD RICHARD, JR-; SEPTUVIE RICHARD, JR.; WINNIFRED RICHARD CHAWAGNE; SHARON RICHARD BIGGS; SIDNEY J. RICHARD, JR., ARTHUR H. OWENS; PRUDENCE LAFARGUE BURNS; HOPE RICHARD SANSING; RICHARD WAYNE OWENS; SHAYNE OWENS BELL; BARBARA VEEDER MCKOIN; CAROL VEEDER WONMffiR; DIANE SIMONS LOVELL,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA, LOUISIANA INTRASTATE GAS COMPANY, L.L.C.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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Before REAVLEY, JOLLY and EMILIO M. GARZA, Circuit Judges. REAVLY, Circuit Judge:*

*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The district court's judgment dismissing appellants' complaint is affirmed for the following reasons.

A. *Jurisdiction*

The United States contends that the district court lacked subject matter jurisdiction under the Quiet Title Act. We must address this jurisdictional challenge even if there is an alternative, simpler ground for affirmance on the merits.[1] Further, we cannot agree with appellants that we lack appellate jurisdiction to address the government's challenge to the district court's subject matter jurisdiction because the government did not file a notice of appeal. "Even though an appellee has not filed a cross appeal, he may take the position on appeal that the record supports the court's judgment on any ground, including one rejected or ignored in the lower court."[2] In addition, we have a duty to consider, *sua sponte* if necessary, the basis of the district court's jurisdiction.[3]

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[1] *See United States v. Texas Tech Univ.*, 171 F.3d 279, 286-87 (5th Cir. 1999) (discussing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998)).

[2] *Hoyt R. Matise Co. v. Zurn*, 754 F.2d 560, 565 n.5 (5th Cir 1985).

[3] *See Solsona v. Warden, F.C.I.*, 821 F.2d 1129, 1132 n.2 (5th Cir. 1987).

Under the Quiet Title Act, 28 U.S.C. § 2409a, "[t]he United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest."[4] The federal district courts have exclusive jurisdiction of civil actions under the Act.[5] However, under the disclaimer provision of the Act: "If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has Jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title."[6]

The United States argues that, after this suit was filed and the sale of the pipeline to Louisiana Interstate Gas Company (LIG) was completed, it filed with the district court a disclaimer of any interest in the pipeline, thereby divesting the court of jurisdiction under the disclaimer provision. As we interpret this provision, the government can disclaim any interest in the property that is the subject of the quiet title action and thereby divest the district court of jurisdiction, but this provision does not apply where the district court had jurisdiction at the commencement of suit and the government thereafter takes affirmative steps to transfer its interest in the subject property. We follow this interpretation for several reasons. First, the language of the disclaimer provision manifests congressional intent to provide the courts with some flexibility in applying the provision, since it provides for a

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[4] *Id.* § 2409a(a).

[5] *See* 28 U.S.C. § 1346(f).

[6] 28 U.S.C. § 2409a(e).

cessation of jurisdiction only if the government's disclaimer is "confirmed by order of the court," rather than requiring dismissal in a mechanical fashion upon the filing of a disclaimer by the government. Second, the government's interpretation of the disclaimer provision would lead to a waste of judicial resources. So long as the government owned or had an interest in the pipeline, any quiet title action had to be brought in federal district court. To force a plaintiff to sue in federal court, and then require the court to dismiss the suit once the government sells the property in question, strikes us as a strained and inefficient result that we do not believe Congress intended. In the words of the Ninth Circuit, our interpretation of the disclaimer provision "permit[s] the plaintiff to have its day in court, [and] also restrains any tendency on the part of the government to manipulate its position subsequent to the filing of the complaint so as to present a situation that falls between the cracks of applicable waiver statutes."[7] While we accept the government's contention that the sale of the pipeline was not in response to the suit, our interpretation of the statute is consistent with the general rule that subject matter jurisdiction is determined at the time the complaint is filed.[8] "Importantly, the jurisdictional facts must be judged as of the time the complaint is filed- subsequent events cannot serve to deprive the court of jurisdiction once it has attached."[9]

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[7] *Bank of Hemet v. United States*, 643 F.2d 661, 665 (9th Cir. 1981).

[8] *See Carney v. RTC*, 19 F.3d 950, 954 (5th Cir. 1994).

[9] *St. Paul Reinsurance Co. v. Greenberg*, 134 F.3d 1250, 1253-54 (5th Cir. 1998).

Our interpretation is also consistent with our decision in *Delta Savings & Loan Association v. IRS*.[10] In *Delta Savings*, a lender had foreclosed on a house owned by a bankruptcy debtor. The IRS exercised a statutory right of redemption of property the plaintiff-lender had acquired through foreclosure. The lender sued the IRS. The main issue, not relevant here, was whether the IRS had made an adequate tender to the lender. The IRS also claimed that the district court had no jurisdiction. In a footnote, we held that the court had jurisdiction under the Quiet Title Act, even though the IRS had sold the house prior to being served:

> Although this action was not formally denominated a quiet title action, we believe that it is in substance such an action, the theory being that the United States failed to acquire good title to the property in question by reason of an inadequate tender, and is therefore susceptible of jurisdiction. The IRS challenges this conclusion, arguing that because the government relinquished its ownership interest prior to being served, section 2409a is inapplicable. We disagree. In *Bank of Hemet v. United States*, 643 F. 2d 661 (9th Cir. 1981), the Ninth Circuit held that where a party had filed a complaint and a *lis pendens* but had not effected service prior to sale of the disputed property, "the presence of a waiver of sovereign immunity should be determined as of the date the complaint was filed." *Id* at 665. Here, it is undisputed that Delta filed both a lis pendens and a complaint on August 22, 1986, three days before the public auction at which the property in question was sold. Thus, even though service was not effected until September 22, 1986, under the rule announced in *Bank of Hemet*, the presence of a waiver should be determined as of August 22, 1986. Because the government still owned the

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[10] 847 F.2d 248 (5th Cir. 1988).

property on that date, we find that section 2409a's waiver is applicable and hence that jurisdiction is proper under section 1346(f).[11]

Factually, in the pending case the complaint was filed and the government was served before the sale of the pipeline, while in *Delta Savings and Bank of Hemet,* the suit had been filed but the government had not been served before the government sold the property in issue. Regardless, the principle followed in *Delta Savings* and *Bank of Hemet* is the general principle that jurisdiction should be determined on the facts as they existed when the complaint was filed. By this reasoning, the district court correctly held that it had jurisdiction because the government still owned the pipeline at the time the suit was filed.

The government points out that in *Delta Savings* and *Bank of Hemet* it did not disclaim all interest in the property under the disclaimer provision of the Act. While the disclaimer provision is not cited in these decisions, in both the government plainly argued that the district court lacked subject matter jurisdiction because the property in issue had been sold by the government subsequent to suit."[12] The key concept recognized in *Delta Savings,* consistent with general principles of jurisdiction, is that "'the presence of a waiver of sovereign immunity should be determined as of the date the complaint

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[11] *Id.* at 249 n. 1.

[12] *See id.* (noting that IRS challenged jurisdiction "because the government relinquished its ownership interest prior to being served"); *Bank of Hemet,* 643 F.2d at 664.

was filed.'"[13] We therefore agree with the district court that it had subject matter jurisdiction.

B. *Ownership of the Servitude*

As we understand appellants' position, they argue that the decommissioning of the pipeline by the government for use in supplying petroleum to the Weeks Island facility, a Strategic Petroleum Reserve Program (SPRP) facility, amounted either to an "abandonment" of the pipeline, or the occurrence of a resolutory condition of the servitude. Under either theory, appellants contend that, under the servitude they granted to the government, the ownership of the servitude and pipeline reverted to them.

We have recently held that the Quiet Title Act should be interpreted "in accordance with principles of federal law," and, "while courts may properly look to state law as an aid in determining the application of statutory language to specific facts, such state law should be compatible with the purpose of the legislation so as to find the rule that will best effectuate federal policy."[14]

The parties cannot agree whether the Donation of Servitude and Easement, sometimes referred to as the Richard Donation, created a predial or personal servitude under

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[13] *Delta Savings*, 847 F.2d at 249 n. 1 (quoting *Bank of Hemet*, 643 F.2d at 665).

[14] *Bank One Texas v. United States*, 157 F.3d 397, 403 (5th Cir. 1998) (internal quotation marks, citations, and alterations omitted), *cert. denied*, 119 S. Ct. 1761 (1999).

Louisiana law. We do not see this issue as dispositive.[15] We think instead that general principles of contract and property law, recognized in Louisiana and elsewhere, should guide our decision. General contract law should govern construction of the servitude, whether it is characterized as a predial or personal servitude.[16] Questions concerning the construction or

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[15]*See Heirs of Primeaux v. Erath Sugar Co.*, 484 So. 2d 717, 720 (La. Ct. App. 1986) (noting that conveyance of land by landowner to sugar company for use as a site for a sugar refinery, and with right of reversion to heirs if refinery ceased operations, could be characterized as "a conventional predial servitude" or "could equally be termed a limited personal servitude").

[16]*See Brown v. Rougon*, 552 So. 2d 1052, 1056 (La. Ct. App. 1989) (holding that right-of-way deed is "subject to the general rules for the interpretation of contracts"); *Ryan v. Monet*, 666 So. 2d 711, 714 (La. Ct. App. 1995) ("A document purporting to create a predial servitude is interpreted in accordance with both the general rules of contract construction as well as in accordance with specific rules of construction for instruments that purport to create servitudes."); La. Civ. Code art. 645 (providing that personal servitudes are regulated by rules governing predial servitudes to the extent their application is compatible with rules governing personal servitudes); *Heirs of Primeaux*, 484 So. 2d at 720 (noting that personal servitudes are governed by laws of usufruct and predial servitudes). We also note that the assignability of a servitude is not necessarily affected by a characterization of the servitude as a personal servitude, as opposed to a predial servitude, the latter being generally analogous to a covenant running with the land under Anglo-American common law, *see* La. Civ. Code art. 650 ("A predial servitude is inseparable from the dominant estate and

interpretation of contracts are questions of law and are accordingly reviewed de novo.[17]

Louisiana law recognizes that a servitude on real property can contain a reversionary interest in favor of the donor or vendor, a form of "resolutory condition."[18] The Richard Donation expressly provides that the servitude granted the government terminates upon "abandonment." However, we cannot agree with appellants that the government's sale of the pipeline amounted to an abandonment of it. First, Louisiana courts, consistent with the generally accepted usage of the term, recognize that abandonment implies the relinquishment of property without vesting ownership in another.[19]

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passes with it"), since personal servitudes are assignable under Louisiana law. *See* La. Civ. Code art. 643.

[17]*See L & A Contracting Co. v. Southern Concrete Servs., Inc.*, 17 F. 3 d 106, 109 (5th Cir. 1994).

[18]*See Heirs of Primeaux,* 484 So. 2d at 721 (noting that "[t]he jurisprudence of Louisiana has long recognized reversionary interests in real property" and describing such reversionary interests as a form of resolutory condition); La. Civ. Code art. 773 (providing that predial servitude established under a resolutory condition expires upon the happening of the condition).

[19]*See* Taussig v. Goldking Properties Co., 495 So. 2d 1008, (La. Ct. App. 1986) (""Abandonment" of property or of a right is the voluntary relinquishment thereof by its owner or holder, with the intention of terminating his ownership, possession and control, and without vesting ownership in any other person.") (quoting *Salim v. Louisiana State Bd. of Educ.*, 289 So. 2d 554, 560 (La. Ct. App. 1974). *See also* BLACK LAW

Second, characterizing the sale of the pipeline to LIG as an abandonment of it would, by appellants' interpretation of the instrument, render the pipeline unassignable. Any effort to assign the pipeline to another, by sale or otherwise, would cause the government's ownership of the servitude to terminate. Under the terms of the Richard Donation, abandonment of the easement results in its termination; termination puts the government to the option of removal of the pipeline or "abandonment on place," which results in the reversion of the pipeline to the donors. Either way, the government could not assign the pipeline and servitude to a third party. Such an interpretation squarely conflicts with other provisions of the Richard Donation, which provide that the donors are conveying to the United States "and its assigns"; "a perpetual and assignable easement and right-of-way," and that the "perpetual rights . . . of the easement and/or servitude" are conveyed to the United States "and its assigns . . . forever . . ." An interpretation that renders an assignment of the pipeline to a third party an "abandonment" of it therefore runs afoul of basic rules of contract interpretation. Under Louisiana law, "[e]ach provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole."[20] Contract provisions should be

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DICTIONARY 2 (5th ed. 1979) (defining abandonment as "[t]he voluntary relinquishment of possession of thing by owner with intention of terminating his ownership, but without vesting it in any other person").

[20]La. Civ. Code art. 2050. *See also Heirs of Primeaux*, 484 So. 2d at 720-21 ("The rule of interpretation is that effect must be given to all of the stipulations in an instrument, if possible, in order to give full effect to the intention of the parties, after viewing the document as a whole.").

interpreted "to avoid neutralizing or ignoring any of them or treating them as surplusage."[21]

Alternatively, appellants argue that the servitude terminated because, under its provisions, a termination occurs if the government (or an assignee) stops using the pipeline as part of the SPRP. True, the Richard Donation states that the conveyance of the easement and right-of-way is made to the government "for the location, construction, [etc.] of a single pipeline in the establishment, management, and maintenance of the Strategic Petroleum Reserve." The Donation goes on to state that the servitude "is acquired by the United States of America for and in connection with the Department of Energy's Strategic Oil Storage Program," and that the donation is made "in consideration of Grantors' desire to aid their country in the establishment of a Strategic Petroleum Reserve and in further consideration of the Grantee's agreement to construct and operate said pipeline." While we admire appellants' patriotic motive and commend their generosity, we must agree with the district court that the Donation did not provide for termination in the event the government ceases operating the pipeline as part of the SPRP. Examining the document as a whole, there are specific grounds for termination of the servitude, including ten years of non-use, abandonment, as discussed above, and the failure of the government to commence construction of the "Strategic Petroleum Reserve pipeline" by December 1, 1981. The Donation, however, did not provide for termination if, after construction and use of the pipeline as a part of the SPRP, the use of the pipeline changed. While the Donation does state that it is made for the construction of a pipeline "in the establishment . . . of the Strategic Petroleum Reserve" and

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[21] *Lambert v. Maryland Cas. Co.*, 418 So. 2d 553, 559 (La. 1982).

expresses the grantor's desire to aid "in the establishment of a Strategic Petroleum Reserve," it does not provide for a reversion to the grantors if in the future the original purpose has been fulfilled but the pipeline's use as a part of the SPRP comes to an end. Given this lack of an express cause for termination upon a change in the use of the pipeline, we cannot interpret the Donation to provide for an implied termination on this basis. As one court has explained:

> The jurisprudence of Louisiana has long recognized reversionary interests in real property. The failure of the donor or vendor to reserve expressly a right of reversion constitutes a divestiture or abandonment of any such right-, in the absence of a reversionary clause the heirs or assigns of the donor or vendor cannot set aside the transfer or repossess the property because of a failure by the donee or vendee to use the property for the restrictive purposes for which it was sold.[22]

Further, appellants' request that we read an implied additional ground for termination into the instrument is all the more untenable given the express language of the donation, quoted above, which provides for the conveyance of a "perpetual" and "assignable" servitude. Given this general language of conveyance - "perpetual" is used three times, "assigns" is used twice, "forever" and "assignable" are used once - we cannot construe the Donation to provide for this additional, unstated, ground for termination.

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[22] *Heirs of Primeaux*, 484 So. 2d at 721 (citations omitted).

We also find persuasive three cases from other jurisdictions where property interests were conveyed to the United States for life-saving stations.[23] The instruments conveying the property interests stated that the purpose of the conveyances was the establishment of lifesaving stations.[24] However, like the pending case, the conveyances did not expressly provide that the property interests reverted to the original grantors if the purpose or use of the property changed. The plaintiffs claimed that conveyances terminated after the use of the land in issue changed. In each case, the court ruled that the property interests did not revert to the grantor. In two of the cases, the courts reasoned that "'[t]he mere recital in the deed of the purpose for which the land conveyed was to be used is not in itself sufficient to impose any limitation or restriction on the estate granted."[25] In the third case, the court reasoned that "[d]eed language alleged to create a determinable fee is strictly construed, to avoid a forfeiture," and declined "to construe the language of purpose contained in this deed as an expression of intent to return the property to the grantor when the purpose has been exhausted or satisfied."[26] We essentially agree with the reasoning of these cases.

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[23]See United States Trust Co. v. New Jersey, 543 A.2d 457 (N.J. Super. Ct. App. Div.1988); *Lethin v. United States*, 583 F. Supp. 863 (D. Or. 1984); *Selectment of the Town of Nahant v. United States*, 293 F. Supp. 1076 (D. Mass. 1968).

[24]*United States Trust Co.*, 543 A.2d at 459; *Lethin*, 583 F. Supp. at 865-66; *Town of Nahant*, 293 F. Supp. at 1077.

[25]*Lethin*, 583 F. Supp. at 871 (quoting *Town of Nahant*, 293 F. Supp. at 1078).

[26]*United States Trust Co.*, 543 A.2d at 462.

C. *Supplemental Jurisdiction*

Appellants complain that the district court erred in declining to exercise supplemental jurisdiction over a state law claim asserted by some plaintiffs for lesion beyond moiety. This claim, essentially a state law claim for rescission based on inadequate consideration,[27] involves separate right-of-way agreements these plaintiffs entered into with LIG. LIG entered into these agreements to foreclose claims by the plaintiffs that LIG had not acquired good title to the servitude discussed above. Appellants concede that if we affirm the district court's summary judgment in favor of the government and LIG, agreeing with the district court that the servitude did not terminate and revei-t to the plaintiffs, then the state claim is moot.[28] We agree.

D. *Denial of Motion to Compel*

Appellants argue that the district court erred in denying a motion to compel production from the government of a document discussing the government's sale options for the pipeline. The government claimed attorney-client privilege. Plaintiffs concede that the document in issue is "a legal analysis." The government contends that the district court denied the motion to compel because it was filed after the discovery cutoff and the document was irrelevant to the court's interpretation of the Richard Donation, while appellants

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[27]*See* La. Civ. Code art. 2589.

[28]*See* appellants' opening brief at 47 (stating that "if the Plaintiffs do not have title to the pipeline due to the termination of the Richard Donation and the abandonment of the pipeline, the Plaintiffs' lesion claim is moot").

maintain that the motion was timely. "The trial judge's decision to curtail discovery is granted great deference and, thus, is reviewed under an abuse of discretion standard."[29] There was no abuse of discretion. The district court decision, and our own, turn on the law and the language of the Richard Donation itself. The government's prior analysis of the legal issues presented is irrelevant.

AFFIRMED.

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[29]*Wichita Falls Office Assocs. v. Banc One Corp.*, 978 F.2d 915, 918 (5th Cir. 1992).

EMILIO M. GARZA, Circuit Judge, dissenting:

The district court was stripped of subject-matter jurisdiction over the plaintiffs' Quiet Title Act ("QTA") claims.[1] The QTA's disclaimer provision states:

> If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

28 U.S.C. § 2409a(e). The Government, pursuant to this provision, filed a disclaimer of any interest in the pipeline before the trial of this case actually commenced. As there was no other jurisdictional basis for the QTA claims, the district court at this point should have confirmed the disclaimer,[2] and

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[1]The district court concluded that counts I through V of the complaint arise solely under the QTA. The plaintiffs do not appeal this holding.

[2]I agree with the Government that confirmation "formalize[s] by court order the disclaimer . . . so that the disclaimer may be relied upon by others." We must construe the disclaimer provision, as a condition to a waiver of sovereign immunity, strictly in favor of the Government. *See Block v. Notih Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287, 103 S. Ct. 1811, 1819, 75 L. Ed. 2d 840, ____ (1983) (QTA) ("when Congress attaches conditions to legislation waiving sovereign immunity of the United States, those conditions must be strictly

dismissed the QTA claims for lack of subject-matter jurisdiction.

Accordingly, I dissent.

U.S. COURT OF APPEALS
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CHARLES R. FULBRUGE, III
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observed, and exceptions thereto are not to be lightly implied"). This rule of construction requires us to interpret the disclaimer provision in a way that maximizes the extent of the Government's ability to disclaim. To satisfy this mandate, we must conceptualize confirmation as a ministerial function, and not a discretionary function, of the district court. *But see, W. H. Pugh Coal Co. v. United States,* 418 F. Supp. 538, 539 (E.D. Wis. 1976) (indicating that the district court should refuse to confirm when the Government disclaims in bad faith).

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JERON J. LAFARGUE, et al. on behalf of themselves and all others similarly situated	CIVIL ACTION NO. 97-2393 SECTION "R" (1)

VERSUS

THE UNITED STATES OF AMERICA and
LOUISIANA INTRASTATE GAS COMPANY

ORDER AND REASONS GRANTING
DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT

This matter comes before the Court on cross-motions for summary judgment filed by the plaintiffs and defendants United States of America (the "Government") and Louisiana Intrastate Gas Company, L.L.C. ("LIG"). For the reasons set forth below, plaintiffs' motion is DENIED, and defendants' motions are GRANTED.

I. BACKGROUND

As summarized by the Court in its Order and Reasons denying defendants' motions to dismiss, see Lafargrue v. *United States*, ____ F.Supp. _____, Civ.A.No.97-2393, 1998 WL 167270 (E.D. La. Apr. 8, 1998), this case revolves around the ownership of a pipeline and underlying servitudes located in the Louisiana Parishes of Iberia, St. Mary, St. Martin, St.

James, and Assumption. The servitudes were acquired and the pipeline was constructed by the government as part of its Strategic Petroleum Reserve Plan ("SPRP'l), a program that was established under the Energy Policy and Conservation Act ("EPCA"), 42 U.S. C. § 62 01, *et seq.* The SPRP was intended to serve as a reserve to reduce the impact of energy supply interruptions or reductions in imports of crude oil and refined petroleum products. Under the EPCA, and to the extent necessary or appropriate to implement the SPRP, the government is authorized to "acquire by purchase, condemnation or otherwise, land or interests in land for the location of storage and related facilities. 42 U.S.C. § 6239 (f) (1) (B). The government may also "construct, purchase, lease or otherwise acquire storage and related facilities," and "use, lease, maintain, sell, or otherwise dispose of storage and related facilities acquired pursuant to this part." Id. 9 6239(f)(1)(C),

(D) Further, the government is authorized to "execute any contracts necessary to carry out the provisions" of the SPRP. Id. § 6239(f) (1) (G).

In furtherance of the SPRP, the government sought to construct a 36-inch diameter pipeline to extend approximately 67 miles from the St. James Terminal to the Weeks Island Facility. In order to lay the Pipeline, and pursuant to statutory authority, the Government secured rights-of-way from landowners by means of direct purchase, condemnation, or donation. The named plaintiffs in this proposed class action are parties r-o a certain Donation of Servitude and Easement dated

August 10, 1979 (hereinafter "the Donation").[1] The Donation states:

> The above named parties declare that we, by this act, do donate, convey, transfer, set over and deliver, without any warranty, liability, or recourse, but with full substitution and subrogation in and to all rights and action of warranty which said grantors have or may have against all preceding owners and vendors, unto the United States of America, and its assigns, including its officers, agents, servants, and contractors, a perpetual and assignable easement and right-of-way in, on, over and across the land for the location, construction, operation, maintenance, alteration, repair, and patrol of a single pipeline in the establishment, management, and maintenance of the Strategic Petroleum Reserve.

Donation at 2. The Donation includes a provision on the causes and procedures for the termination of the easements:

> This donation is made and accepted for and in consideration of Grantors' desire to aid their country in the establishment of a Strategic Petroleum Reserve and in further consideration of Grantee's agreement to construct and operate

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[1] Plaintiffs noted in prior memoranda submitted to the Court that while this specific Donation of Servitude and Easement pertains only to a small portion of the Pipeline, there are several hundred other landowners who made similar donations, as well as other types of conveyances to the government.

said pipeline in accordance with the following specific requirements:

1. The rights herein donated to Grantee shall expire, terminate, and cease and this act shall be rendered null, void and unenforceable on December 31, 1981 if by such date Grantee shall have not commenced construction of the Strategic Petroleum Reserve pipeline.

2. The causes for termination of this easement shall include, but not be limited to, the following: (a) abandonment, (b) removal of the pipeline, (c) ten years non-use, or (d) execution of an affidavit by an authorized representative of the United States of America stating that the pipeline has been abandoned. Upon termination for any reason the United States of America shall have the election at its sole discretion of abandoning the pipeline and related improvements in place or removing it at its own expense. Such removal, if so elected, shall be completed within one year after termination. if abandonment in place is elected, Grantee shall have no claim against Grantors for compensation or damages, and the pipeline and related improvements shall become the property of the Grantors without any payment to the Grantee.

Donation at 5.

The construction of the Pipeline was completed in 1979, and it was in continuous service as part of the SPRP from

October 1980 to March 1997. During this time, the Pipeline was used to transport crude oil between the St. James Terminal and the Weeks Island Facility. In recent years, due in part to a geotechnical problem related to the underground storage facility at Weeks Island, the Government removed the oil from that location and in March 1997, decommissioned the Pipeline. The Government no longer uses the Pipeline to transport oil between the two locations.

After the decision to decommission the Pipeline was made, the Government solicited bids from interested parties for the sale of the Pipeline and the perpetual easements. After this suit was filed, the Government sold and conveyed to LIG, "as is" and "where is" under a quitclaim deed executed August 22, 1997 all title, right, and interest the Government had in the Pipeline and the perpetual easements for a total sum of $22,000,000. LIG intends to integrate the Pipeline into its existing pipeline system, which is used for the transportation of natural gas.

Prior to the August 22, 1997 sale, LIG--"out of an abundance of caution"--attempted to enter into new conventional right-of-way and servitude agreements with the landowners along the length of the pipeline (hereinafter the "LIG Agreement"). The LIG Agreement 5 states that the new servitude will be subject to the Donation and that the Donation will terminate when LIG begins operations of the existing Pipeline as a natural gas pipeline or when the Government transfers all of its rights in the Donation, whichever comes first. See Compl., Exh. B. LIG contends that 95!k of the landowners along the length of the Pipeline have entered into such agreements. LIG's Answer ¶ 1A.

Plaintiffs initiated this class action on July 31, 1997 and filed a first amended complaint on October 24, 1997. Plaintiffs, proposed class is defined as all those persons and entities who granted servitudes and easements in favor of the Government for the location, construction, operation, maintenance, alteration, repair, and patrol of the Pipeline. Compl. ¶ 8. The plaintiffs also propose two subclasses: (1) All those persons and entities who fall into the proposed class and who executed the LIG Agreement, or similar documents; (2) All those persons and entities who fall into the proposed class and who did not execute the LIG Agreement, or similar documents. Compl. ¶ 9.

In its Order and Reasons denying defendants' motions to dismiss, this Court concluded that plaintiffs' case was exclusively brought under the Quiet Title Act, 28 U.S.C. § 2409a (QTA) . Consequently, the Court dismissed Counts II, III, IV, and V of plaintiffs, complaint because they sought relief that is not available under the QTA. The Court also declined to exercise supplemental jurisdiction over Count IV of plaintiffs' complaint, a claim requesting this Court to determine whether the Pipeline constitutes a corporeal immovable under Louisiana law and whether certain plaintiffs' agreements with LIG should be rescinded for lesion beyond moiety. The Court further refused supplemental jurisdiction over LIG's counterclaim for expropriation of plaintiffs, property

The lawsuit in this Court is therefore whittled down to a single issue: Whether the servitudes granted to the Government by the plaintiffs have been terminated, extinguished, and/or abandoned as a result of the alleged non-use of the Pipeline and the alleged decommissioning of the Weeks Island Facility. Plaintiffs allege that the servitudes have expired and/or terminated for the following reasons:

(a) the Government, through its own actions, has permanently discontinued the use of the Servitudes for the purpose for which they were granted, i.e., in connection with the Strategic Petroleum Reserve, and has transferred, or is in the process of transferring its right under the Servitudes and to the Pipeline to a transferee engaged in the business of transporting natural gas, rendering it impossible for the Government to use the Servitudes for the purposes required thereby;

(b) the Servitudes were granted subject to the express or implied resolutory condition that the Pipeline be used solely in connection with the Strategic Petroleum Reserve Program and the resolutory condition has been fulfilled;

(c) the Government has decommissioned, or is in the process of decommissioning the Weeks Island Facility and the Pipeline; and/or

(d) the Government has renounced the Servitudes.

Compl. ¶ 42.

Before the Court are the parties' cross-motions for summary judgment. The Court rules as follows.

II. DISCUSSION

A. Summary of Arguments

Plaintiffs suggest that the Donation must be interpreted under Louisiana law, and they offer three theories based on state law principles governing predial servitudes in support of their position that the servitudes donated to the Government have terminated and/or expired: (1) the dominant estate, Weeks Island, was destroyed; (2) the servitude is no longer used in a manner consistent with the Donation; and (3) the servitudes were granted subject to the resolutory condition that the Pipeline be used solely in connection with the SPRP.

The defendants offer a number of arguments contrary to plaintiffs' three theories. First, the Government reiterates its argument that the government cannot dispose of property without explicit Congressional authority.[2] Second, relying on

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[2]The Court once again rejects this argument and notes that the cases relied on by the Government for this assertion involve condemnation proceedings in which the government acquired the disputed property under its power of eminent domain. It is true that in those circumstances--i.e., condemnation proceedings--the Attorney General is authorized to agree, on behalf of the United States, to return the property to the original land owners. See 40 U.S.C. § 258f. The cases cited by the Government, e.g., *United States v. 434.00 Acres of Land*, 792 F.2d 1006, 1010 (11th Cir. 1986) ; *United States v. Three Parcels of Land*, 224 F. Supp. 873, 876 (D. Alaska 1963), state that the court is without authority to order the revesting of title in the original owners because § 256f entrusts such matters to the Attorney General. This case is a quiet title action in which the plaintiffs donated easements to the government. This is not a condemnation proceeding, and the Government did not acquire the disputed property under its powers of eminent domain. Statutes

what is purported to be federal common law, the Government argues that abandonment, or a change in the use of the property, does not invalidate the Government's title. Third, the Government argues that, in any case, it has not abandoned the Pipeline or the servitudes. Fourth, the Government responds directly to plaintiffs, theories and asserts that Weeks Island is not the dominant estate, and there are no resolutory conditions in the Donation. Similarly, LIG contends that the servitudes have not terminated under any theory of state law. For the reasons more fully explained below, the Court holds that the Government has maintained ownership of the servitudes and the Pipeline continuously since 1979, and plaintiffs' lawsuit is without merit.

B. Standard of Review

Summary judgment is appropriate when there is no genuine issue as to any material facts, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v.* Catrett, 477 U.S. 317, 322-23 (1986). Factual controversies are resolved in favor of the non-moving party only if there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts. Little v. Liquid Air *Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) . The court must determine whether there are any genuine issues of material fact which preclude judgment as a matter of law. *Anderson v.* Liberty *Lobby, Inc.*, 477 U.S. 242, 250 (1986).

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governing condemnation proceedings are wholly inapplicable to this lawsuit, and cases involving such proceedings are therefore distinguishable.

C. Governing Law and Nature of the Servitudes

The first question raised by the parties is whether state or federal law governs the interpretation of property rights in an action brought under the QTA. Courts are divided on this issue: Many courts apply state law without comment. *See, e.g., Patterson v. Buffalo Nat'l River,* 76 F.3d 221 (8th Cir. 1996); *Bradford v. United States,* 651 F.2d 700 (10th Cir. 1981) ; *Lethin v. United States,* 583 F. Supp. 863 (D. Or. 1984). Some courts conclude that federal law controls in actions under the QTA but that courts may consult state property law and adopt it as the federal standard if that law is neither hostile nor contrary to federal interests. *See, e.g., Kafrige v. United States,* 893 F. Supp. 691, 697-700 (S.D. Tex. 1995)([Tlhe construction of a deed to which the United States is a party is a question of federal law . . . . 11) ; *cf. CTH.H Enters. v. Brunson (In re Havard)* , 209 B.R. 196, 198 (W.D. La. 1997) (stating that "'federal law governs questions involving the rights of the United States arising under nationwide federal programs'" and finding that federal positive law provided sufficient guidance to resolve disputed issue (quoting, United *States v. Kimbell Food, Inc.,* 440 U.S. 715, 726, 99 S.Ct. 1448, 1457 (1979)). Still other courts acknowledge that the QTA should be interpreted according to federal law, but federal courts may look to state law to determine the application of statutory language to specific facts. *See, e.g., Amoco Prod. Co.* v. United *States,* 619 F.2d 1383, 1387 (10th Cir. 1980) (failing to question whether state law would interfere with federal interests and noting that "questions involving ownership, transfer and title to real estate have traditionally been resolved according to the laws of the state where the realty is located"); *Adams United States,* 687 F. Supp. 1479, 1492 (D. Nev. 1988) (same). In some instances, the court fails to specify whether state or federal law is applicable. *See, e.g., Stevenson v. United*

States, 960 F.2d 147 (Table), 1992 WL 79532 (4th Cir. Apr. 21, 1992) (unpublished opinion).

The courts are also split on whether federal or state law controls in condemnation proceedings and in cases brought under the Declaratory Taking Act. *Compare United States v. 93.970 Acres of* Land, 360 U.S. 328, 332-33, 79 S.Ct. 1193, 1195-96 (1959) (condemnation proceeding in which Court held that condemnation involves essential government functions and that "where essential interests of the Federal Government are concerned, federal law rules unless Congress chooses to make state laws applicable"); *Higginson v. United States*, 384 F.2d 504, 506 (6th Cir. 1967) (citing *93.970 Acres* and stating that "nature of title taken by federal condemnation is subject to determination by federal law unless Congress states otherwise"); *United States v. 434.00 Acres of Land*, 792 F.2d 1006, 1009-10 & n.5 (11th Cir. 1986) (stating that federal government is not subject to common law property rules), *with Coos County Sheep Co.* v. *United States*, 331 F.2d 456, 460 (9th Cir. 1964) (stating that in condemnation proceeding state property law controls nature and extent of rights of United States acquired under easement) ; *United States v. Certain Property* Located in Borough *of Manhattan*, 306 F.2d 439, 444-45 (2d Cir. 1962) (looking to state law to determine government's property rights in condemnation proceeding) ; *Foster v. United States*, 607 F. 2d 943, 948 (Ct. Cl. 1979) ("[Wlhen the United States contracts to acquire or in fact acquires real property within a particular state, the laws of that state control what rights arise in the United States therefrom.").

In the absence of any controlling authority in the Fifth Circuit, and against this background of conflicting rulings, this Court must decide the choice-of-law issue. The specific question in this case is whether the interpretation of a

conveyance of real property between a private party and the government should be determined by state or federal law when the property was acquired by the government under the authority of the Energy Policy and Conservation Act and the lawsuit was brought under the Quiet Title Act. The Court notes that neither the QTA nor the EPCA specifies the appropriate rule of decision. In the absence of a statutory directive, the Court must first consider whether the matter justifies reliance on federal law. *See Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67, 63 S.Ct. 573, 574-75 (1943).

This question seems to have been definitively resolved by the Supreme Court in *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591-94, 93 S.Ct. 2389, 2396-98 (1973), a case initiated by the United States to quiet title to properties owned by the United States subject to mineral reservations in favor of various defendants. The Supreme Court concluded that interstitial federal lawmaking was appropriate in that case because it was dealing with the interpretation of a land acquisition agreement that was ,(a) explicitly authorized, though not precisely governed by the Migratory Bird Conservation Act and (b) to which the United States itself [was] a party." *Id.* at 594, 93 S.Ct. at 2397. The Court noted that "dealings which may be ordinary' or 'local' as between private citizens raise serious questions of national sovereignty when they arise in the context of a specific constitutional or statutory provision; particularly is this so when transactions undertaken by the Federal Government are involved." Id. at 592, 93 S.Ct. at 2397.

In this case, under explicit Congressional authority from the EPCA, and to the extent necessary or appropriate to implement the Strategic Petroleum Reserve Plan, the Government accepted donations of easements from the

plaintiffs and acquired the rights to the property in dispute. Although the United States did not initiate this lawsuit, the plaintiffs brought suit under the QTA, and the Government is properly a party to this action. As was the case in Little Lake, the issues in this case are substantially related to an established program of government operation, and federal interests are clearly implicated by this lawsuit. Thus, the Court f inds that the present situation warrants the application of federal common law. *Cf. Georgia Power Co. v. 138.30 Acres of* Land, 617 F.2d 1112, 1115 (5th Cir. 1980) (finding that federal interests were sufficiently implicated to warrant protection of federal law where power of eminent domain was exercised by licensee of government agency).

The question remaining is whether the court should borrow state law principles to fashion the federal common law. *See, Georgia Power Co.*, 617 F.2d at 1115 (citing *United States v. Kirabell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448 (1979)). In *Georgia Power*, the Fifth Circuit held that:

> Basic considerations of federalism, as embodied in the Rules of Decision Act, prompt us to begin with the premise that state law should supply the federal rule unless there is an expression of legislative intent to the contrary, or, failing that, a showing that state law conflicts significantly with any federal interests or policies present in this case.

Id. at 1115-16 (citations omitted). This Court has not discovered any legislative intent under either the EPCA or the QTA that federal common law and not state law should supply the rule of decision. The Court therefore turns to "an examination of the considerations relevant to the nature of the

specific governmental interests and to the effects upon them of applying state law." Id. at 1118 (internal quotations omitted).

The Supreme Court stated in Little Lake that "even assuming in general terms the appropriateness of 'borrowing' state law, specific aberrant or hostile state rules do not provide appropriate standards for federal law." Little Lake, 412 U.S. at 595-96, 93 S.Ct. at 2398. *See Georgia Power*, 617 F.2d at 1118 ("If the effect of applying state law is virtually to nullify the federal objectives, then there is a conflict that precludes application of state law."). In Little Lake, the Supreme Court reviewed a state law that subjected land acquisitions authorized by Congress to a rule of retroactive imprescriptibility. In exercising its authority to acquire land under the Conservation Act, the government gave the prior landowners a mineral reservation of ten years. The state statute would have barred the reversion of the mineral rights to the United States and in effect extend the prior landowners' rights indefinitely. The Supreme Court explained that this rule was plainly hostile to federal interests because retroactive application of the statute to the United States "deprive[d] it of bargained-for contractual interests." *Little Lake*, 412 U.S. at 597, 93 S.Ct. at 2399. The Supreme Court thus concluded that state law did not govern the reversion of the mineral rights at issue in the litigation. *See also, North Dakota v United States*, 460 U.S. 300, 317-20, 103 S.Ct. 1105-06 (1983) (finding state law hostile to federal interests and not applying it to easements acquired by United States); *cf. United States v. Albrecht*, 496 F.2d 906, 911-12 (8th Cir. 1974) (holding that if state law would bar conveyance of property to United States then it should not apply because it would destroy national program of acquiring property to aid in breeding of migratory birds).

After a careful review of the applicable state law and the facts of this case, the Court finds that if Louisiana law as interpreted by the plaintiffs applies, then it conflicts with federal interests as stated in the legislation that created the Strategic Petroleum Reserve Plan. The purpose of the SPRP is to "minimize the impact [in any region in the United States] of any interruption or reduction in imports of refined petroleum and residual fuel oil." 42 U.S.C. 9 6234(a). To implement the SPRP, Congress gave the Department of Energy the authority to enter into contracts and to "acquire by purchase, condemnation, or otherwise, land or interests in land" for the location of pipelines. Id. § 6239 (f) (B), (G) . The statute also authorizes the government to "use, lease, maintain, sell or otherwise dispose of storage and related facilities pursuant to this part." Id. § 6239 (f) (D).

Under plaintiffs' interpretation of Louisiana law, the rights-of-way at issue are predial servitudes. A predial servitude is [a] charge on a servient estate for the benefit of a dominant estate." La. C.C. art. 646. The servient estate and the dominant estate must belong to different owners, and the charge on the servient estate must provide a benefit to the dominant estate. Id. art. 647. Plaintiffs argue that the dominant estate is the Weeks Island Storage Facility, property owned by the Government.

Under Louisiana law, a predial servitude is inseparable from the dominant estate, and it cannot be alienated or encumbered separately from the dominant estate. Id. art. 650. Thus, if the Government's rights-of-way are predial servitudes, Louisiana law would prohibit the Government from selling the rights-of-way separately from the Weeks Island Facility. The statute creating the SPRP, however, specifically empowers the Secretary to use, maintain, sell or otherwise dispose of storage and related facilities acquired pursuant to the legislation. The

statute does not restrict the goveinment's ability to dispose of related facilities, such as a pipeline, to a simultaneous sale or disposition of a storage facility. Nor does the Donation itself so limit the transferability of the Pipeline right-of-way. Since state law would prevent the Government from selling the pipeline rights-of-way separate from the Weeks Island Facility, it would produce a result that is clearly inconsistent with both federal interests and the Government's intentions as evidenced by the Donation.

In an analogous situation, the Fifth Circuit rejected the application of Louisiana law after it determined that Louisiana property law would interfere with federal interests. In *Shell offshore, Inc. v. Kirby Exploration Co.*, 909 F.2d 811 (5th Cir. 1990), the application of Louisiana law on predial servitudes, which provided for the extinguishment of a predial servitude when the servient estate is abandoned, conflicted with the outer Continental Shelf Lands Act, which prohibited an owner from abandoning an offshore platform under the circumstances at issue. In light of the conflict, the court refused to apply Louisiana law. Id. at 815.

In any case, plaintiffs are wrong to characterize the servitudes created by the Donation as predial servitudes under Louisiana law. The Court finds that the rights-of-way created by the Donation are properly interpreted as personal servitudes of rights of use. Louisiana law recognizes that parties may create a personal servitude of right of use in favor of a natural person or legal entity for a specified use of an estate less than full enjoyment. La. C.C. art. 641. In contrast to a predial servitude, which benefits a dominant estate, a personal servitude is for the benefit of a designated person or legal entity. Howevei, the right of use may confer only an advantage that may be established by a predial servitude, id. art. 640, and

such personal servitudes are regulated by the rules governing predial servitudes to the extent that their application is compatible with the rules governing personal servitudes. Id. art. 645.[3] The Civil Code also provides that a right of use is transferable unless prohibited by law or contract. Id. art. 643.

When the instrument which creates the servitude raises a question as to whether the right granted benefits an estate or a particular person, i.e., whether it is a predial or personal servitude, the rules of contractual interpretation as provided in the Civil Code and the rules applicable specifically to servitudes govern its resolution. A.N. Yiannopoulos, *Louisiana Civil Law Treatise, Predial Servitudes*, § 128, at 370 (2d ed. 1997); *cf.* Guillotte *v. Wells*, 485 So.2d 187, 189 (La. App. 2d Cir. 1986) (examining circumstances under which servitude was created in order to determine its character when servitude was created by oral agreement). Under Louisiana law, the 11 interpretation of a contract is the determination of the common intent of the parties. 11 La. C.C. art. 2045. "This intention 'must be determined from the stipulations of the entire instrument..... Yiannopoulos, supra, at 370-71 *(quoting Rock island Arkansas & Louisiana Railroad Co. v. Gournay*, 17 So. 2d 8, 9 (La. 1943)) . Servitudes impose restraints on property and restrict the free use and disposal of the estate. It follows that 11[slervitudes claimed under title are never sustained by implication; the title creating them must be express as to their nature and extent, as well as to the estate that owes them and

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[3]Therefore, any theory of termination premised on the existence of a dominant estate is necessarily incompatible with a personal servitude of right of use because there is no dominant estate. However, other grounds for termination--e.g., the happening of a resolutory condition--may govern personal servitudes of right of use.

the estate to which they are due.,, *Williams v. Wiggiz2s,* 641 So.2d 1068, 1072 (La. App. 2d Cir. 1994). *See* Yiannopoulos, supra, at 372 (citing cases with same language); see *also Williams,* 641 So.2d at 1068 ("A predial servitude may be created by title where the grantor sufficiently expresses an intent to create such [a] servitude.,,). The Civil Code also provides that 11[w]hen the right granted be of a nature to confer an advantage on an estate, it is presumed to be a predial servitude. B La. C, C. art. 733. However, "[w]hen the right granted is merely for the convenience of a person, it is not considered to be a predial servitude, unless it is acquired by a person as owner of an estate for himself, his heirs, and assigns." Id. at. 734.

Here, the Donation evidences a clear intent to benefit the United States, and it does not express an intention to benefit any particular property owned by the government, Rather, the Donation generally states that 11 [t] his donation is made and accepted for and in consideration of [plaintiffs'] desire to aid their country in the establishment of a Strategic Petroleum Reserve." Donation at 4. The Donation does not even mention Weeks Island, the property which the plaintiffs claim to be the dominant estate, and it does not restrict the Government to developing the SPRP at any particular location or to using any specific storage facility. Further, that the legislation provided for the disposal of the property makes it unlikely that the parties intended to restrict the Government's ability to sell the servitudes separately from Weeks Island, a restriction that would apply if the rights were predial servitudes. Indeed, the Donation specifically provides that the rights transferred are assignable. Finally, the utility of the predial servitude must be attributed to any person who, at any given time, happens to own the dominant estate. *See* Yiannopoulos, supra, § 9, at 33. Thus, "[ilf the utility is attributed to a designated owner, the

servitude is personal rather than predial." Id. Here, plaintiffs expressly contend that the rights-of-way were intended to benefit only the United States in the establishment of the SPRP, a position inconsistent with an intent to grant rights-of-way on their property that would exist in favor of the owner of Weeks Island, whoever that may be. The United States acquired these easements to enable them to construct and operate a pipeline that would be a part of the SPRP. It is clear that the utility of the servitudes is attributed to the United States, not Weeks Island or any other estate.

For all of these reasons, the Court concludes that under Louisiana law the servitudes created by the Donation are personal servitudes of rights of use. This interpretation of the application of state law neither frustrates federal interests nor constrains the Government's bargained-for interests. Accordingly, the Court borrows Louisiana law to fashion the federal common law.

D. Plaintiffs' Theories of Termination

Plaintiffs' first theory of termination--the destruction of the dominant estate--necessarily fails because the easements are personal servitudes and are not dependent upon the existence of the dominant estate. The remainder of plaintiffs, theories are premised on the argument that the servitudes created by the Donation were limited ones, granted only for the construction and operation of a pipeline to assist in the Strategic Petroleum Reserve Plan. The plaintiffs argue that using the servitudes for any other purpose, i.e., for a purpose that does not assist the SPRP, amounts to abandonment, an express cause for termination under the Donation. In a similar vein, plaintiffs also argue that the servitude has terminated because the purpose for which it was granted, i.e., only for the SPRP

pipeline, has become an impossibility. As a final variation of this same theme, plaintiffs contend that using the servitude in a manner inconsistent with the limited purpose alleged is a resolutory condition, the happening of which results in the termination of the servitude under Louisiana law. See La. C.C. art. 773 ("A predial [or personal use] servitude established for a term or under a resolutory condition is extinguished upon the expiration of the term or the happening of the condition.").

As in *Lethin v. United States*, 583 F: Supp. 863, 871 (D. Or. 1984), the issue in this case boils down to whether the language of the Donation so strongly indicates an intent to limit the easement to the single use urged by the plaintiffs that any other use is unauthorized. If so, the servitude was abandoned, impossible to use, and/or terminated when the Government stopped using it for purposes of the SPRP.

The Court concluded above that the servitudes at issue are personal servitudes of rights of use. As such, they are regulated by the application of rules governing predial servitudes, to the extent their application is compatible with the rules governing rights of use servitudes. La. C.C. art. 645. The Civil Code makes clear that "[tlhe use and extent of such servitudes are regulated by the title by which they are created." Id. art. 697. *See* Yiannopoulos, supra, § 149, at 416 (11 [T] he extent and manner of use of conventional servitudes established by title are primarily determined in accordance with the intention of the parties, as expressed in the provisions of the title."). Thus, whether the Donation imposes a restriction of a single permissible use of the servitudes depends upon the description of the easement contained in the Donation and the specific language used in the agreement. Under Louisiana law, 11 (w) hen the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in

search of the parties, intent." Id. art. 2046. The Civil Code also provides that "[tlhe words of contract must be given their generally prevailing meaning." Id. art. 2047.

In Louisiana, explicit language is required in order to impose either a restrictive or dissolving condition. *See, e.g.*, Farrell *v. Hodges Stock Yards, Inc.*, 343 So.2d 1364, 1367-69 (La. 1977) (contract stating ",this grant of way shall continue in full force as long as the said property shall be used for the business for which it is now used or any other of like nature"' did not provide for automatic dissolution upon change of use); accord Ralph E. Boyer et al., *The Law of* Property 85 & n.12 (4th ed. 1991) (explaining fee simple determinable under common law and noting that words such as "until," "during," "while," or "so long as" are often used to create special limitation). Further, non-use or abandonment provisions in contracts are typically enforced when a specific limited purpose is clearly contemplated by the parties. *See, e.g.*, Meijer v. international Minerals *& Chemical* Corp., 741 F. Supp. 1238 (M.D. La. 1990) (enforcing provision that provided that 11[ilf at any time said right of way and easement is not used during a period of two years for the purpose hereinabove specified, or in the event it should at any time be used for any other purpose than herein granted . . . all rights vested in grantee . . . cease and terminate" but finding that use was ongoing and consistent with agreement); *Primeaux v. Brath Sugar Co.*, Ltd., 484 So.2d 717 (La. App. 3d Cir. 1986) (finding resolutory condition and reversionary interest when contract stated that "in case said Refinery shall cease to operate . . . then and in that case said land shall revert to the said appearer"); *Noel Estate v. Kansas City Southern & Gulf Ry. Co.*, 175 So. 468 (1937) (finding that contract limited use of land to railroad purposes only when contract stated that land was "conveyed for railroad purposes only and this grant shall be in perpetuity or so long as it is used

only and this grant shall be in perpetuity or so long as it is used by said company, its successor, or assigns, for railroad purposes, but if abandoned by said company for such use and purpose, then said land shall revert to the grantor").

The Donation between the plaintiffs and the Government states in pertinent part:

> The above named parties declare that we, by this act, do donate, convey, transfer, set over and deliver, without any warranty, liability, or recourse, but with full substitution and subrogation in and to all rights and action of warranty which said grantors have or may have against all preceding owners and vendors, unto the UNITED STATES OF AMERICA, and its assigns, including its officers, agents, servants, and contractors, a perpetual and assignable easement and right-of-way in, on, over and across the land for the location, construction, operation, maintenance, alteration, repair. and patrol of a single pipeline in the establishment, management. and maintenance of the Strategic Petroleum Reserve, as authorized by . . . Congress . . . .
>
> TO HAVE AND TO HOLD the complete perpetual ricfhts, powers, Privileges of the easement and/or servitude hereby conveyed unto the UNITED STATES OF AMERICA and its assigns, including its officers, agents, servants, and contractors, forever, subject to the other provisions hereof. . . .
>
> The aforementioned servitude is acquired by the United States of America for an(d] [sic] in connection with the Department of Energy's Strategic Oil Storage Program.

> This donation is made and accepted for and in consideration of Grantors' desire to aid their country in the establishment of a Strateciic Petroleum Reserve and in further consideration of Grantee's agreement to construct and operate said pipeline in accordance with the following specific requirements: . . .
>
> 2. The causes for termination of this easement shall include, but not be limited to, the following: (a) abandonment, ... Upon termination for any reason the United States of America shall have the election at its sole discretion of abandoning the pipeline and related improvements in place or removing it at its own expense. Such removal, if so elected, shall be completed within one year after termination. If abandonment in place is elected, Grantee shall have no claim against Grantors for compensation or damages, and the pipeline and related improvements shall become the property of the Grantors without any payment to the Grantee.

Donation at 2-5 (emphasis added).

The Court concludes that the language of the Donation does not indicate an intent to restrict the use of the easement solely to the Strategic Petroleum Reserve Plan. It seems clear to the Court that although the easement was granted for the purpose of the "location, construction, operation, maintenance, alteration, repair, and patrol of a single pipeline," any reference to the SPRP merely demonstrates the existence of a public purpose,[4] describes the reasons for the United States'

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[4]4A description of the public purpose is routinely included by the United States in its property agreements when it acquires land

acquisition, and declares the overall purpose for which the plaintiffs expect their donated land to be used. The Donation in this case does not use any words of limitation, and it does not contain any language to suggest that the easement was intended to last only so long as the Pipeline was used in connection with the SPRP. Unlike the cases cited supra, *see* Meijer, 741 F. Supp. at 1240; *Primeaux*, 484 So.2d at 717, the Donation does not indicate that the pipeline easement must be used "only" in connection with the SPRP or that the easement would terminate if it were used "for any other purpose." Indeed, no limiting words are used when the Donation states its overall purpose.[5] The plaintiffs, interpretation of the Donation is contrary to the clear words of the agreement, and their interpretation of "abandonment" is inconsistent with the term's generally prevailing meaning. "Abandonment" refers to the voluntary relinquishment of possession of a thing by the owner with the intention of terminating ownership, but without vesting it in any other person. *Black's Law Dictionary 2* (6th ed. 1990). *Cf. Guzzetta v. Texas Pipeline Co.*, 485 So.2d 508, 510 n.1 (La. 1986) (using definition of abandonment from Black's in determining whether plaintiffs stated claim for termination of pipeline right-of-way). Moreover, just as the Court concluded in its prior order that selling or transferring an

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through a condemnation action. Under the Declaration of Taking Act, the government is required to state the public use for which the land is taken. See 40 U.S.C. § 258a.

[5]The Court notes that plaintiffs fail to cite any cases in which a general statement of the purpose for the donation or conveyance was construed as limiting the use to a single use absent explicit language of exclusivity.

interest in property is not a disclaimer, such actions also do not demonstrate an intent to abandon the property.

Further, the sale of the Pipeline and the underlying rights--of-way to LIG will not significantly change the character of the use of the easement. The easement was originally acquired by the Government for the construction and maintenance of a single pipeline that would transport crude oil. LIG will use the Pipeline to transport natural gas, essentially for the same purpose as it was used by the Government. The relative burdens on the plaintiffs, estates are therefore identical.

In addition, the plaintiffs' interpretation of the Donation--that the servitudes may be used by the Government only f or a purpose that assists the SPRP--is contrary to the plaintiffs, intentions of conveying "a perpetual and assignable easement" to the Government. If plaintiffs, interpretation of the limitations on the easements' use governed, the provision making the servitudes assignable would be rendered meaningless because no person or entity but the Government can operate the SPRP. The existence of such an assignability provision implicitly creates a servitude with a significantly broader permissible use. *Cf. United States v. 434.00 Acres of Land,* 792 F.2d 1006 (llth Cir 1986) (stating in dicta that provision allowing for reassignment for commercial purposes implicitly created broad scope for permissible use of easement notwithstanding language in conveyance creating,"an easement and right for the establishment, maintenance, operation and use of a safety area, in connection with the Kings Bay Ammunition Loading Terminal"').

Courts from other jurisdictions faced with similar factual circumstances have also concluded that language in the agreement setting forth the purpose for the conveyance does

not limit the grantee's use of the property or create a determinable fee. In *Lethin v. United States,* for example, the court examined a deed in which the original property owners granted to the United States a right-of-way "'for the purposes of carrying out the intentions of Congress in providing for the establishment of Life Saving Stations.'" Lethin, 583 F. Supp. at 870. The court determined that the easement was not limited to use only for life saving stations, and the deed merely indicated that the easement was intended to be used in a manner consistent with the purpose of the conveyance itself, i.e., to provide access to the river. Id. at 872. The court also concluded that the deed did not suggest that the easement was to revert or expire if used for something other than life saving services. See id. ("The deed contains no language suggesting a reversion or automatic expiration of the easement if used for purposes other than those associated with life saving services."). Other courts reach identical conclusions. *See also, Selectmen of Town of Nahant* v. United *States,* 293 F. Supp. 1076, 1078 (D. Mass. 1968) (construing similar deed and holding that "[t]here is no language indicating that the estate is to expire when the property ceases to be used for the purposes mentioned or that it is intended to last only so long as the property is so used. . . . The mere recital in the deed of the purpose for which the land conveyed was to be used in not itself sufficient to impose any limitation or restriction on the estate granted.") ; United *States Trust Co. v. State,* 543 A.2d 457, 460 (N.J. Super. Ct. App. Div. 1988) (interpreting conveyance for life saving station and finding that "the intent to create a determinable fee is found in the use of the words of limitation, such as 'while,' 'during,' and 'so long as.' . . . . Words of limitation merely stating a purpose for which the land is conveyed usually do not indicate an intent to create a determinable fee."); *cf. Meijer*, 741 F.Supp. at 1240-41 (interpreting broadly how pipeline could be "used" when

agreement specified that rights would terminate "[ilf at any time said right of way and easement is not used during a period of two years for the purpose hereinabove specified, or in the event it should at any time be used for any other purpose than herein granted"').

This Court's interpretation of the Donation between plaintiffs and the Government is also consistent with the results reached by courts in the condemnation setting, and under federal law, where it is well established that a declaration of taking generally provides for a fee simple and that " [a] subsequent abandonment of the original purpose for which land was acquired does not affect the validity of the condemnation. *Higginson v. United* States, 384 F.2d 504, 507 (6th Cir. 1967); *see United States v. Three Parcels of* Land, 224 F. Supp. 873, 877 (D. Alaska 1963) (stating that if land is acquired in fee simple unconditional, "land may be devoted to a different use without any impairment of the estate acquired or any reversion to the former owners" ; *Boorstein v. Massachusetts* Port Authority, 345 N.E.2d 668, 670 (Mass. 1976) ("The recitation in the declaration of taking that the easement was 'to be used as a pipeline right of way in connection with the Naval Fuel Depot' did not limit the Federal government's interest in the easement. The proposed use was recited in the declaration of taking not as a limitation but in order to demonstrate the existence of a public purpose for the condemnation . . . ."); *City of Alameda v. Todd Shipyards Corp.*, 632 F. Supp. 333, 338 *(N.* D. Cal. 1986) (interpreting agreement in which government was party and concluding that phrase describing purpose for conveyance did not express reversionary interest but simply declared purpose for which grantor expected land would be used).

In summary, the Court rejects plaintiffs, definition of "abandonment," finds that the servitudes and the Pipeline are not impossible to use, and concludes that the Donation does not impose a limited use resolutory condition. Thus, using the servitudes in a manner that does not assist the SPRP does not extinguish the easements, and the Court concludes that the rights created in the Donation and conveyed to the Government never reverted to the original landowners. Plaintiffs, claims for relief in this Court are therefore without merit.

Accordingly, and for all of the foregoing reasons, defendants' motions for summary judgment are GRANTED, and plaintiffs, motion for summary judgment is DENIED.

New Orleans, Louisiana, this 27th day of May, 1998.

SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
1998 MAY 27 P 12:50
LORETTA G. WHYTE
CLERK

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-30657

JERON J. LAFARGLTE; SUSAN KYLE, on behalf of themselves and all others similarly situated; RONALD RICHARD, JR-; SEPTUVIE RICHARD, JR.; WINNIFRED RICHARD CHAWAGNE; SHARON RICHARD BIGGS; SIDNEY J. RICHARD, JR., ARTHUR H. OWENS; PRUDENCE LAFARGUE BURNS; HOPE RICHARD SANSING; RICHARD WAYNE OWENS; SHAYNE OWENS BELL; BARBARA VEEDER MCKOIN; CAROL VEEDER WONMffiR; DIANE SIMONS LOVELL,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA, LOUISIANA INTRASTATE GAS COMPANY, L.L.C.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana (97-CV-2393R)

ON PETITION FOR REHEARING

Before REAVLEY, JOLLY and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Appellants have petitioned for rehearing and cite two Louisiana Supreme Court decisions holding that a reversionary clause is not required to protect the interest of the donor when the purpose of the donation is no longer met. Those cases are: *Board of Trustees of Columbia Road Methodist Episcopal Church of Bogalusa v. Richardson*, 44 So.2d 321 (La. 1950) and *Orleans Parish School Bd. v. Campbell*, 132 So.2d 885 (La. 1961). The donation in those cases placed an express condition or charge on the donee, which is not the case at hand.

We previously noted that, under Louisiana law, "[e]ach provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole." La. Civ. Code art. 2050. The circumstances that distinguish our case *from Richardson* and *Campbell* are that (1) the donation in our case repeatedly states that the servitude conveyed is assignable and perpetual, and (2) the conveyance listed several express grounds for termination, including ten years of non-use, abandonment, and the failure of the government to commence construction of the "Strategic Petroleum Reserve pipeline" by December 1, 1981, but did not provide for a termination if the use of the pipeline changed after completion of the pipeline. In these circumstances, and reading the contract as a whole, we conclude that Louisiana law would not recognize an implied reversionary interest that is triggered when the use of the pipeline changes. We believe that the Louisiana courts would

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*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

hold that, given the express grounds for termination, and the language stating that the servitude is otherwise perpetual and assignable, the servitude should revert to the donor (or his heirs) only for those reasons expressly stated. Louisiana law recognizes the maxim *expressio unius est exclusio alterius* - the expression of one implies the exclusion of others - in the construction of statutes and agreements. *Theriot v. Midland Risk Ins. Co.*, 694 So.2d 184, 187 (La. 1997); *Harper v. Citizens' Bank of Louisiana*, 25 So. [sic] 466, 468 (La. 1899).

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

U.S. COURT OF APPEALS
FILED
OCTOBER 13 1999
CHARLES R. FULBRUGE, III
CLERK

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

JERON J. LAFARGUE; SUSAN KYLE; RONALD RICHARD; SEPTIME RICHARD, JR.; WINNIFRED RICHARD CHAMPAGNE; SHARON RICHARD BIGGS; SIDNEY J .JUDGE: VANCE RICHARD, JR.; ARTHUR H. OWENS; PRUDENCE LAFARGUE BURNS; HOPE MAGISTRATE: RICHARD SANSING; RICHARD WAYNE SECTION "R" (1) OWENS; SHAYNE OWENS BELL; BARBARAVEEDER MCKOIN; CAROL VEEDER WOMMER; and DIANE SIMONS LOVELL; on behalf of themselves and all others similarly situated,

plaintiffs,

v.

THE UNITED STATES OF AMERICA and
LOUISIANA INTRASTATE GAS COMPANY, L.L.C.,

defendants.

CIVIL ACTION
NO. 97-2393
JUDGE: VANCE
MAGISTRATE: RICHARD SANSING;
SECTION "R" (1)

DECLARATION OF PATRICIA C. SIGUR

Patricia C. Sigur, pursuant to 28 U.S.C. § 1746, declares and states:

1. I, Patricia C. Sigur, am employed as a Realty Officer by the United States Department of Energy ("DOE"), Strategic Petroleum Reserve ("SPR") Project Management Office. I have been employed by DOE since 1986, and my

office is located at 900 Commerce Road East, New Orleans, Louisiana 70123. A Realty officer is responsible for a number of activities or functions relating to real estate, including the acquisition, disposal, utilization, planning and appraisal of real property under the control of SPR.

2. For the purpose of making this Declaration, I have reviewed, among other materials, the documents identified in the following subparagraphs.

(a) A document entitled "Quitclaim Deed," which was executed on August 22, 1997, by which the United States of America ("Government") remised, or bargained, or released, or sold, or conveyed, or granted by quitclaim certain property or interests therein to the Louisiana Intrastate Gas Company, L.L.C. ("LIGC"). Because I signed the Quitclaim Deed ("Deed") on behalf of the Government, I have a true and correct copy of the Deed in the official files I maintain in the normal course of business. I have attached to this Declaration as Exhibit A a true and correct copy of the Deed, which includes all materials or exhibits that are attached thereto.

(b) A document entitled "First Amended Complaint -- Class Action" ("Complaint") that I have been advised by attorneys for the Government has been filed in this case, and it has a certificate of service dated October 24, 1997. Among other things attached to the Complaint is a document, dated August 10, 1979, that is identified as "Exhibit A" and is entitled "Donation of Servitude And Easement" ("Donation"). The Donation was executed by a representative of the Government and by the owners of the real property or interest therein, all of which is located in St. Mary Parish, Louisiana, that is the subject of the Donation. Under the terms of the Donation, the parties named therein granted to the Government, among other things, a perpetual and assignable easement and

right-of-way for the real property or interest therein that is the subject of the Donation. The copy of the Donation attached to the Complaint that I reviewed is not complete. Because the Government was a signatory to the Donation, I have a complete, correct and true copy of the Donation in the official files that I maintain in the normal course of business. Therefore, I have attached to this Declaration as Exhibit B a complete, true and correct copy of the Donation, which includes all materials or exhibits attached thereto.

(c) A document entitled "Answer of Defendant United States of America to First Amended Complaint -- Class Action" that I have been advised by attorneys for the Government has been filed in this case, and it has a file stamp date of December 2, 1997.

(d) A document entitled "Answer and Counterclaim" that I have been advised by attorneys for the Government has been filed in this case. This document is signed by attorneys for LIGC, and it has a certificate of service dated December 10, 1997.

3. Involved in this case is a 36 inch diameter pipeline, with appurtenances and improvements related thereto or associated therewith, that is approximately 67 miles in length and extends from the St. James Terminal, which is located in St. James Parish, Louisiana, to Weeks Island, which is located in Iberia Parish, Louisiana. This pipeline, which I will refer to as the "Weeks Island Pipeline" or the "Pipeline," was used by the Government to transport crude oil. The St. James Terminal and Weeks Island sites I have just identified are both fee properties owned by the Government, and I will refer to them as the "St. James Station" and the "Weeks Island Station," respectively. The Weeks Island Pipeline begins/ends on the St. James Station and begins/ends on the Weeks Island Station.

Therefore, each end of the Weeks Island Pipeline is located on a fee property owned by the Government, and at each end of the Pipeline is a device commonly known in the industry as a "Pig Trap," which I am advised is used to clean a pipeline. Beginning on the Weeks Island Station and generally heading in an easterly direction towards the St. James Station, the Weeks Island Pipeline, as is indicated by the Deed, is located on land in Iberia, St. Mary, St. Martin, Assumption and St. James Parishes, Louisiana. Attached to this Declaration as Exhibit C is a schematic I prepared for illustrative purposes that generally shows the placement of the Weeks Island Pipeline in these five parishes.

4. Prior to the construction of the Pipeline, the Government did not own, and did not intend to purchase, the real property between the St. James and Weeks Island Stations on which the Pipeline was to be placed. In order to lay the Pipeline, the Government had to secure rights-of-way from the landowners. The rights-of-way were secured for all such property by means of the Government obtaining perpetual and assignable easements, servitudes or license agreements, all of which I will refer to as "Easements." The Government obtained the Easements by means of direct purchase, or condemnation or donation.

5. The Deed describes in detail all of the property or interest therein that the Government did or did not remise, or bargain, or release, or sell, or convey, or grant to LIGC, including certain interests or rights related to the Government's fee owned properties at the Weeks Island and St. James Stations. with respect to the Weeks Island Pipeline and the Easements associated with the Pipeline, I have been requested by attorneys for the Government to describe the interests, if any, that the Deed transferred to LIGC, and the interests, if any, the Government retained.

6. The Government remised, or bargained, or released, or sold, or conveyed, or granted to LIGC, "as is" and "where is," all of the Government's right, title and interest in the Weeks Island Pipeline and appurtenances thereto, as it extends from the Pig Trap on the Weeks Island Station to the Pig Trap on the St. James Station, traversing over land located in the Parishes of Iberia, St. Mary, St. Martin, Assumption and St. James, as well as another improvements and appurtenances on, under and over all land, which is located outside of the Government owned fee properties at the Weeks Island and St. James Stations, necessary to enable LIGC to operate and maintain the Pipeline. Therefore, based on the Deed that I executed on behalf of the Government, I am authorized to, and do hereby formally, declare that the Government disclaims all interest in the Weeks Island Pipeline.

7. The Government also remised, or bargained, or released, or sold, or conveyed, or granted to LIGC, "as is" and "where is," all of the Government's right, title and interest in certain of the Easements that the Government had obtained from landowners through direct purchase, or condemnation or donation for the placement of the Weeks Island Pipeline. More specifically, with the exception of the Easements identified below in paragraph 8, the Government sold and conveyed to LIGC all of the Easements that it had obtained in the Parishes of Iberia, St. Mary, St. Martin, Assumption and St. James for the placement of the Weeks Island Pipeline. The Easements that were sold and conveyed to LIGC are identified on page 1 of the Deed, subparagraph (a), and in Exhibit A to the Deed. Based on the Deed that I executed on behalf of the Government, I am authorized to, and do hereby formally, declare that the Government disclaims all interest in such Easements.

8. As is indicated above in paragraph 7, the Government did not sell and convey to LIGC some Easements on certain land located in Assumption and St. James Parishes that had been obtained for the Weeks Island Pipeline by direct purchase, or condemnation or donation. The Easements relate to eleven tracts of land, which are identified on page 2 of the Deed, subparagraph (c), and in Exhibit B to the Deed. Such Easements were not sold and conveyed to LIGC because another SPR pipeline was also located on the same tracts of land. This other SPR pipeline extends from the St. James Terminal to Bayou Choctaw, Iberville Parish, Louisiana, and it is located approximately parallel to the Weeks Island Pipeline on these certain tracts of land in Assumption and St. James Parishes. Because tire Bayou Choctaw pipeline was not being transferred to LIGC, the Government did not sell and convey to LIGC the Easements for the tracts of land across which both pipelines traverse. To ensure that LIGC could operate and maintain that portion of the Weeks Island Pipeline that traverses these tracts of land, the Government granted and conveyed to LIGC a perpetual right of ingress and egress to the use of all supporting rights-of-way granted to the Government by its Easements. Although the Government granted and conveyed a perpetual right of ingress and egress to its rights-of-ways for these Easements, the Government does not disclaim its interests in these Easements.

9. To the extent that the named Plaintiffs' real property or interest therein that is the subject of this case is located anywhere in Iberia, St. Mary, St. Martin, Assumption or St. James Parish, and is not one of the tracts described above in paragraph 8, I am authorized to, and do hereby formally, declare, based my execution of the Deed on behalf of the Government, that the Government disclaims all interest in the real property or interest therein adverse to the Plaintiffs. This disclaimer specifically applies to any portion of the Weeks

Island Pipeline that traverses the named Plaintiffs' land and, with the exception stated in paragraph 8, any Easement that the Government had obtained from the named Plaintiffs for the placement of the Weeks Island Pipeline.

Further, Declarant saith not.

APPENDIX E

PROJECT: Weeks Island Facility
TRACTS: 309E-1. 309E-2, 309E-3, 319E-1, 319E-2, 319E-3

AUGUST 10, 1979

DONATION

OF

SERVITUDE AND EASEMENT

UNITED STATES OF AMERICA
STATE OF LOUISIANA
PARISH OF ST. MARY

KNOW ALL MEN BY THESE PRESENTS THAT THE FOLLOWING PERSONS CAME AND APPEARED:

MARIE BLANCHE RICHARD VEEDER, a widow, who was married but once and then to Joseph Earl Veeder, deceased, whose mailing address is Charenton, Louisiana 70523;

MARGUERITE AIMEE RICHARD, a single female, never married, whose mailing address is P. 0. Box 49, Charenton, Louisiana 70523;

IRMA AGNES RICHARD COOPER, married to William Cooper with whom she is presently living

and residing at 95 Lee Street, Franklin, Louisiana 70538;

ODETTE E. RICHARD SIMONS, married to Gerald S. Simons, with whom she is presently living and residing and whose mailing address is c/o Mrs. Diane Lavell, 4004 Pershings Avenue, Fort Worth, Texas 76107;

ALVAN HENRY LAFARGUE, JR., married to Reba Cagle LaFargue, with whom he is presently living and residing at 922 Kirby Street, Lake Charles, Louisiana 70601;

PRUDENCE ELIZABETH IAFARGUE BURNS, married to Bernard F. Burns, with whom she is presently living and residing at 530 West Logan, Sulphur, Louisiana 70663;

AUGUSTIN A. RICHARD, married to Julia Pullen Richard, with whom he is presently living and residing at 326 West Drive, Baton Rouge, Louisiana 70608;

HAROLD P. RICHARD, married to Marcella LeHuene Richard, with whom he is presently living and residing at 4366 Bluebonnet Road, Baton Rouge, Louisiana 70809;

ELISE RICHARD QUIRK, married to Andrew Quirk, with whom she is presently living and residing at 331 Park Avenue, New Orleans, Louisiana 70124;

CONRAD JOSEPH RICHARD, married to Martha Belle Harris Richard, with whom he is presently

living and residing at 1867 Longwood Drive, Jackson, Mississippi 39212;

SEPTIEME SERVEROUS RICHARD, married to Terry Sylvester Richard, with whom he is presently living and residing at 3619 Lansdowne Drive, Montgomery, Alabama 36111;

ROBERT G. NICHOLS, an Attorney whose mailing address is P. 0. Box 1526, Jackson, Mississippi 39201, appearing herein as Guardian of ROBERT LOUIS RICHARD, a single male, never married, whose mailing address is c/o Agnell Cuevas, Rt. 3, Box 824, Bay St., Louis, Mississippi 39520;

MARJORIE RICHARD LAFOSSE, married to Percy LaFosse, with whom she is presently living and residing at 5005 Inverness, Baytown, Texas 77502;

WINNFRED ANNIE MARIE RICHARD CHAMPAGNE, married to E. J. Champagne, with whom she is presently living and residing at 115 Oak Street, Franklin, Louisiana 70538;

SIDONIE JOHN RICHARD BODIN, married to Russell Bodin, with whom she is presently living and residing at 2569 Echo Drive Northeast3 Atlanta, Georgia 30329;

SHARON JUDITH LORRAINE RICHARD BIGGS, married to Donald Biggs, with whom she is presently living and residing at 513 Renwood Circle, Lafayette, Louisiana 70501;

SIDNEY J. RICHARD, JR., married to Gail Allen Richard, with whom he is presently living and residing at 48 East Hain, Franklin, Louisiana 70528;

HOPE MARY RICHARD SANSING, married to Parks William Sansing, with whom she is presently living and residing, and whose mailing address is P. 0. Box 224, Forest Hill, Louisiana 71430;

LORETTA ANNE BIENVENU RICHARD, a widow, who was married but once and then to Arthur Richard, deceased, presently living and residing at 1607 Providence, New Iberia, Louisiana 70560;

ARTHUR JUDE RICHARD, married to Shelia Goff Richard, with whom he is presently living and residing at 1833 Longwood, Jackson, Mississippi 39212;

KATHLEEN ANN RICHARD FERRIS, married to Norman B. Ferris, with whom she is presently living and residing at Rouge 5, Compton Road, Murfreesboro, Tennessee 37130;

MARK JOSEPH RICRARD, a single male, never married who is presently living and residing at 1607 Providence, New Iberia, Louisiana 70560;

JERONS J. LAFARGUE, formerly married to Lelia Young LaFargue, and presently living and residing at Sheridan Marina, Slip #2, Impossible Dream, Fort Walton Beach, Florida 32548;

MELINDA SUSAN LAFARGUE KYLE, married to James W. Kyle, with whom she is presently living and

residing at 920 Lilliput Lane, Sulphur, Louisiana 70663;

ARTHUR OWENS, married to Sandra Champagne Owens, with whom he is presently living and residing at 325 Pioneer Drive, Baton Rouge, Louisiana 70814;

BLANCHE OWENS TRUMPS, married to Anthony J. Trumps, with whom she is presently living and residing and whose mailing address is Box 1, Route 5, Beaufort, South Carolina 29902;

SHAYNE OWENS BELL, married to Michael Bell, with whom she is presently living and residing and whose mailing address is c/o Blanche Owens Trumps, Box 1, Route 5, Beaufort, South Carolina 29902;

RICHARD WAYNE OWENS, formerly married to Judy Breaux, and presently living and residing at Bayou Woods Villa, Apartment 101, 4200 Maplewood Drive, Sulphur, Louisiana 70663;

SIDWIN JOHN MICHAEL RICHARD, married to Carolyn Hunter, with whom he is presently living and residing at 108 Hamel Street, New Iberia, Louisiana 70560;

The above named parties declare that they are of the age of majority.

The above named parties declare that this conveyance is of their separate property, under their separate control, and for the benefit of their separate estate.

LORETTA ANNE BIENVENU RICHARD, widow of Arthur Richard, residing in New Iberia, Louisiana, appearing herein as usufructary.

The above named parties declare that we, by this act, do donate, convey, transfer, set over and deliver, without any warranty, liability, or recourse, but with full substitution and subrogation in and to all rights and action of warranty which said grantors have or may have against all preceding owners and vendors, unto the UNITED STATES OF AMERICA, and its assigns, including its officers, agents, servants, and contractors, a perpetual and assignable easement and right-of-way in, on, over and across the land for the location, construction, operation, maintenance, alteration, repair, and patrol of a single pipeline in the establishment, management, and maintenance of the Strategic Petroleum Reserve, as authorized by the Act of Congress approved December 22, 1975, Public Law 94-163, 89 Stat. 871, 42 U.S.C. 6201, including the right to trim, cut, fell and remove therefrom, all trees, underbrush, obstructions, and any other vegetation, structures, or obstacles within the limits of the right-of -way; reserving, however to the landowers, their heirs and assigns, all such rights and privileges as may be hereby acquired; subject, however, to existing easements for public roads and highways, public utilities, railroads, pipelines, levees and to existing public drainage facilities, and to the existing outstanding mineral rights of record belonging to third parties; the land or waters in, on, over and/or to which the rights, easements and servitude previously described are hereby conveyed being described as follows:

All of the right, title, and interest of Grantors in and to the areas described on Exhibits "A-1 and A-2", and shown on Exhibits B-1 and B-2 attached hereto and made a part hereof as Tracts numbered 309E-1 and 319E-1.

TO HAVE AND TO HOLD the complete perpetual rights, powers, privileges of the easement and/or servitude hereby conveyed unto the UNITED STATES OF AMERICA and its assigns, including its officers, agents, servants, and contractors, forever, subject to the other provisions hereof.

Further, the above described Grantors donate and convey to the above described Grantee, the full complete temporary and assignable easement and right-of-way in, on, over and across the land for a period not to exceed three years beginning on the 2nd day of August 1979, for use by the United States, its representatives, agents, and contractors, for the construction of a single pipeline in the establishment, management and maintenance of the Strategic Petroleum Reserve, as authorized by the Act of Congress approved December 22, 1975, Public Law 94-163, 89 Stat. 871, U.S.C. 6201, including the right to borrow and/or deposit excavated material thereon and the further right to remove temporary structures on the land and to perform any other work necessary and incident to the construction of the said pipeline, together with the righ t to clear, cut, fell, and remove therefrom all trees, underbrush, obstructions and any other vegetation, structures, or obstacles within the limits of the right-of-way; reserving, however, to the landowners, their heirs and assigns, all such rights and privileges as may be used without interfering with or

abridging the rights and easements hereby acquired; subject, however, to existing easements for public roads and highways, public utilities, railroads, pipelines, levees, and to existing public drainage facilities, and to the existing outstanding mineral rights of record belonging to third parties; the land in, on, and across which the easement and servitude previously described are hereby conveyed being described as follows:

All of the right, title, and interest of Grantor in and to the areas described on Exhibits "C-1. C-2, C-3 and C-4", and shown on Exhibits "B-1 and B-2", attached hereto and made a part hereof as Tracts numbered 309E-2, 309E-3, 319E-2, and 319E-3.

TO HAVE AND TO HOLD the above described rights, powers, privileges of temporary easement and servitude hereby conveyed unto the United States of America, and its assigns, including its officers, agents, servants, and contractors for the aforesaid period of three (3) years; subject to the other provisions hereof.

This donation of the perpetual and temporary rights and privileges of easement, and servitude described is made subject to all existing easements for public roads and highways, public utilities, railroads, pipeline, levees, public drainage facilities and mineral rights of record. Grantor expressly retains all mineral rights with respect to all minerals in, on, or under the area covered by this servitude together with the right to explore for, develop, and produce any or all of said minerals, provided said exploration, development, and

production, if any, shall not interfere with the rights herein conveyed.

The aforementioned servitude is acquired by the United States of America for an in connection with the Department of Energy's Strategic Oil Storage Program.

The Grantor warrants that all state and parish taxes up to and including the taxes due and exigible in the year 1978 have been paid, and is not subject to existing mortgages or other encumbrances. This servitude and easement is granted without any warranty or recourse of any kind against Grantors whatsoever. Grantors do not warrant or represent the correctness of any survey or any plat attached hereto purporting to show the location of Grantors' land or any improvement thereon, and nothing herein shall operate as an estoppel against Grantors' establishing the correct location of the boundaries of or improvements on Grantors' land in the event that the same are not correctly shown on the maps, if any, attached hereto.

This donation is made and accepted for and in consideration of Grantors' desire to aid their country in the establishment of a Strategic Petroleum Reserve and in further consideration of Grantee's agreement to construct and operate said pipeline in accordance with the following specific requirements:

1. The rights herein donated to Grantee shall expire, terminate, and cease and this act shall be rendered null, void and unenforceable on December 31. 1981 if by such date Grantee shall have not commenced construction of the Strategic Petroleum Reserve pipeline.

2. The causes for termination of this easement shall include but not be limited to, the following:(a) abandonment, (b) removal of the pipeline, (c) ten years non-use, or (d) execution of an affidavit by an authorized representative of the United States of America stating that the pipeline has been abandoned. Upon termination for any reason the United State of America shall have the election at its sole discretion of abandoning the pipeline and related improvements in place or removing it at its own expense. Such removal, if so elected, shall be completed within one year after termination. If abandonment in place is elected, Grantee shall have no claim against Grantors for compensation or damages, and the pipeline and related improvements shall become the property of the Grantors without any payment to the Grantee.

3. Because Grantors anticipate that it may become necessary for Grantors or their agents, successors, or assigns, to cross over the Strategic Reserve Petroleum pipeline to be laid in the servitude area, Grantee agrees: to allow Grantors, their agents, successors or assigns, to lower the Strategic Reserve Petroleum pipeline at Grantors' expense.

Because Grantee cannot permit lowering of the pipeline to interfere with fill or drawdown of the Strategic Petroleum Reserve, the lowering of the pipeline will be subject to Grantee's approval, prior to commencement of the lowering operations, of the Grantors'

specifications, construction plans and construction schedule. Grantors shall further supply Grantee with a bond for full replacement of that portion of the line to be lowered. Said bond shall be forfeited for damage to Grantee's pipeline, failure to meet specifications, failure to complete construction according to plans and failure to meet construction schedule if such failure to meet the schedule interferes with the operation or maintenance of Grantee's pipeline.

This document may be executed in counterpart, and if counterparts of this document are executed, the signatures of the parties, as affixed to each counterpart, may be combined into and used as a single document.

Supreme Court, U.S.
FILED
MAR 10 2000
OFFICE OF THE CLERK

(2)

No. 99-1165

IN THE

Supreme Court of the United States

JERON J. LAFARGUE, SUSAN KYLE, *et al.*, on behalf of themselves and all others similarly situated,

Petitioners,

v.

THE UNITED STATES OF AMERICA and LOUISIANA INTRASTATE GAS COMPANY, L.L.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT LOUISIANA INTRASTATE GAS COMPANY, L.L.C.

JAMES P. DORÉ
Counsel of Record
ALAN J. BERTEAU
KEAN, MILLER, HAWTHORNE, D'ARMOND, McCOWAN & JARMAN, L.L.P.
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158351

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court should decline to review a determination by the lower courts that the district court had subject matter jurisdiction of this case under 28 U.S.C. § 1346(f), and the Quiet Title Act, 28 U.S.C. § 2409(a), on the grounds that (a) the petitioners are judicially estopped from asserting a position directly contrary to that assumed by them before the United States Court of Appeal for the Fifth Circuit; (b) the decision by the Fifth Circuit does not meet the criteria set forth in Rule 10(a) of the Rules of the Supreme Court of the United States; and (c) the decision by the Fifth Circuit was correct;

2. Whether the Court should decline to review question 4 presented by petitioners, because there is in fact no conflict between the decisions of the district court and the United States Court of Appeal for the Fifth Circuit and the United States Supreme Court decision in *United States v. Winstar*, 518 U.S. 839, and/or the *Erie* Doctrine, 304 U.S. 64, and/or the Full Faith and Credit Clause of the U.S. Constitution, U.S. Const. art. IV, § 1, and on the further basis that no argument with regard to the *Erie* Doctrine or the Full Faith and Credit Clause was raised in, or passed upon by either of the lower courts.

3. Whether the Court should decline to review Questions 3 and 4 presented by petitioners, on the basis that those questions do not accurately describe the rulings of either the district court or the Court of Appeals for the Fifth Circuit, nor do these questions accurately describe the analysis employed by either court in reaching its

decision, and on the additional grounds that the lower courts properly applied federal common law to resolve the issues before them;

4. Whether the Court should decline to review a determination by the United States District Court for the Eastern District of Louisiana, affirmed by the United States Court of Appeals for the Fifth Circuit, that the pipeline and/or servitude granted by petitioners to the United States did not revert to petitioners.

STATEMENT PURSUANT TO RULE 29.6

Respondent, Louisiana Intrastate Gas Company, L.L.C., is wholly owned by American Electric Power Company, Inc.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Statement Pursuant to Rule 29.6	iii
Table of Contents	iv
Table of Cited Authorities	vii
Statement of the Case	1
Course of Proceedings	2
Reasons for Denying the Writ	5
I. Subject Matter Jurisdiction Under 28 U.S.C. § 2409(a).	5
A. Petitioners are Judicially Estopped From Asserting a Position Before This Court Which Is Diametrically Opposed to the Position They Espoused Before the Lower Courts	6
B. The Lower Court Rulings In This Case On the Issue of Subject Matter Jurisdiction under 28 U.S.C. § 2409(a) Do Not Conflict With Any Decision Cited by Petitioners Which Construes That Statute	9

Contents

Page

C. *Delta Savings* and *Bank of Hemet* Squarely Support the Fifth Circuit Ruling on Subject Matter Jurisdiction under 28 U.S.C. § 2409(a) 12

II. The Lower Court Rulings in This Case Do Not Conflict With the United States Supreme Court Decision in *United States v. Winstar*, the *Erie* Doctrine, or the Full Faith and Credit Clause of the United States Constitution ... 13

A. Petitioners Failed to Raise Any Argument Relating to the *Erie* Doctrine or the Full Faith and Credit Clause Before the Fifth Circuit and This Court Should Thus Refuse to Consider Those Arguments 14

B. The Present Case Does Not Conflict With *Winstar*, *Erie* or the Full Faith and Credit Clause 14

III. The Lower Courts Properly Applied Federal Common Law To Interpret the Richard Servitude and Determine That Ownership of the Pipeline and Servitude Did Not Revert to Petitioners 16

A. Need for Express Provision for Termination or Revocation of Servitude 17

Contents

Page

B. Statement of Public Use Not a Resolutory Condition of the Servitude 19

C. Servitude Was Not Terminated Because Its Use Became "Impossible" 22

Conclusion 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Bank of Hemet v. United States, 643 F.2d 661 (9th Cir. 1981) 7, 8, 12, 23

Bank One Texas v. United States, 157 F.3d 397 (5th Cir. 1998), *certiorari denied*, 119 S. Ct. 1761, 143 L. Ed. 2d 792 (1999) 16, 17

Bily v. Illinois Central Gulf R. Co., 637 F. Supp. 127 (N.D. Ill. 1986) 11

Block v. North Dakota ex rel. Bd. of University and School Lands, 461 U.S. 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (U.S. 1983) 12

Delta Savings and Loan v. IRS, 847 F.2d 248 (5th Cir. 1988) 8, 12, 23

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) .... i, 13, 14, 16, 23

Franco v. Selective Insurance Company, 184 F.3d 4 (1st Cir. 1999) 8

Gardner v. Stager, 103 F.3d 886 (9th Cir. 1996) ... 12

In re Chambers Development Co., Inc., 148 F.3d 214 (3rd Cir. 1998) 8

Cited Authorities

	Page
In re Coastal Plains, Inc., 179 F.3d 197 (5th Cir. 1999)	8
Keeley v. Schexnaider, 97-1609 (La. App. 3d Cir. 4/1/98), 708 So.2d 838	19
King v. Herbert J. Thomas Memorial Hosp., 159 F.3d 192 (4th Cir. 1998)	8
Lafargue v. United States, 4 F. Supp. 2d 593 (E.D. La. 1998)	21
Lee v. United States, 629 F. Supp. 721 (D. Alaska 1985), *affirmed*, 809 F.2d 1406 (9th Cir. 1987), *certiorari denied*, 484 U.S. 1041, 108 S. Ct. 772, 98 L. Ed. 2d 859 (1988)	9, 10
Lesnoi, Inc. v. United States, 170 F.3d 188 (9th Cir. 1999)	10
Madan v. U.S. by and through I.R.S., 850 F. Supp. 148 (N.D.N.Y. 1994)	10
Mitchell v. Washingtonville Cent. School Dist., 190 F.3d 1 (2nd Cir. 1999)	8
Ogden v. Bankston, 398 So.2d 1037 (La. 1981)	19
Orleans Parish School Board v. Campbell, 132 So.2d 885 (1961)	18

Cited Authorities

Page

Orleans Parish School Board v. Campbell, 241 La. 1029, 132 So.2d 885 (1961) 18

Red River v. Noles, 406 So.2d 294 (La. App. 3d Cir. 1981) 19

Ryan v. Southern Natural Gas Co., 879 F.2d 162 (5th Cir. 1989) 19

Simmons v. Board of Commissioners of the Bossier Levee District, 624 So.2d 935 (La. App. 2d Cir. 1993) 18

United States v. Beggerly, 524 U.S. 38, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998) 12

United States v. Williams, 504 U.S. 36, 112 S. Ct. 1735, 118 L. Ed. 2d 352 (1992) 14

United States v. Winstar Corp., 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996) ..i, 13, 14, 15, 23

W.H. Pugh Coal Co. v. United States, 418 F. Supp. 538 (E.D. Wis. 1976) 11

Winstar Corporation v. United States, 64 F.3d 1531 (Fed. Cir. 1995) 15

Winstar Corporation v. United States, 25 Cl. Ct. 541 (1992) 15, 16

Cited Authorities

Page

Statutes:

La. R.S. 38:113 18

Louisiana Civil Code Article 697 19

Louisiana Civil Code Article 749 19

28 U.S.C. § 1346(f) ..... i, 3, 5, 6, 16

28 U.S.C. § 1367 3

28 U.S.C. § 2409 12

28 U.S.C. § 2409(a) ..... i, 3, 5, 6, 9, 10, 12, 13

28 U.S.C. § 2409(a)(e) 5, 6, 13, 23

28 U.S.C. § 2410 12

42 U.S.C. § 6201, *et seq.* 1

42 U.S.C. § 6233 21

42 U.S.C. § 6239(f)(1)(B) 1

42 U.S.C. § 6239(f)(1)(D) 1

43 U.S.C. §§ 1601-1641 9

Cited Authorities

Page

United States Constitution:

U.S. Const. art. IV, § 1 ..... i, 13

Rules:

Fed. R. Civ. P. 12(b)(6) 4

United States Supreme Court Rule 10 ..... 16, 23

United States Supreme Court Rule 10(a) ..... i, 13

Other Authority:

Yiannopoulos, *Extinction of Predial Servitudes*, 56 Tul L. Rev. 1285 (1982) 22

STATEMENT OF THE CASE

This case revolves around the ownership of a pipeline and the underlying servitudes located in the Louisiana parishes of Iberia, St. Mary, St. Martin, St. James, and Assumption. The servitudes were acquired and the pipeline was constructed by the Government as part of its Strategic Petroleum Reserve Plan ("SPRP"). The SPRP was established under the Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. § 6201, *et seq.* and was intended to serve as a reserve to reduce the impact of energy supply interruptions or reductions in imports of crude oil and refined petroleum products. Under the EPCA, to the extent necessary or appropriate to implement the SPRP, the Government is authorized to "acquire by purchase, condemnation or otherwise, land or interests in land for the location of storage and related facilities". 42 U.S.C. § 6239(f)(1)(B). The Government may also "construct, purchase, lease or otherwise acquire storage and related facilities," and "use, lease, maintain, sell, or otherwise dispose of storage and related facilities acquired pursuant to this part." 42 U.S.C. § 6239(f)(1)(B). Further, the Government is authorized to "execute any contracts necessary to carry out the provisions" of the SPRP. 42 U.S.C. § 6239(f)(1)(D).

In furtherance of the SPRP, the Government sought to construct a 36-inch diameter pipeline to extend approximately 67 miles from the St. James terminal to the Weeks Island Storage Facility in Iberville Parish, which were both owned in fee by the Government. In order to lay the pipeline, and pursuant to statutory authority, the Government secured rights-of-way from landowners by means of direct purchase, condemnation and/or donation. The named plaintiffs in this proposed class action are parties to a certain

Donation of Servitude and Easement dated August 10, 1979 (hereinafter the "Richard Servitude").

The construction of the pipeline was completed in 1979 and it was in continuous service as part of the SPRP from October, 1980 to March 1997. During this time, the pipeline was used to transport crude oil between the St. James terminal and the Weeks Island Storage Facility. In recent years, due in part to a geotechnical problem at the Weeks Island Storage Facility, the Government removed the oil from that location and, in March 1997, decommissioned the pipeline. The Government no longer uses the pipeline to transport oil between the two locations.

After the decision to decommission the pipeline was made, the Government solicited bids from interested parties for the sale of the pipeline and the perpetual easements. After this suit was filed, the Government sold and conveyed to Louisiana Intrastate Gas Co., L.L.C. ("LIG"), "as is" and "where is," under Quit Claim Deed executed August 22, 1997, all right, title and interest the Government had in the pipeline and the perpetual easements for a total sum of $22 million. LIG has integrated the pipeline into its existing pipeline system which is used for the transportation of natural gas.

COURSE OF PROCEEDINGS

On July 31, 1997, the named plaintiffs-appellants, fifteen individuals who owned an approximately 50% undivided interest in approximately 4.5 acres of land located in St. Mary Parish, Louisiana, which property is burdened by the Richard Servitude, filed suit against the United States Government and LIG in the United States District Court for the Eastern

District of Louisiana, asserting subject matter jurisdiction under 28 U.S.C. § 1346(f), 28 U.S.C. § 2409(a) and 28 U.S.C. § 1367.

On October 24, 1997, plaintiffs filed a "First Amended Complaint - Class Action" on behalf of themselves and others similarly situated. Plaintiffs' class action stated (6) counts, seeking:

I. A judicial declaration that the right-of-way they or their ancestors in title granted to the United States by the August 10, 1979 donation (*i.e.*, the Richard Servitude) had expired or terminated, and that they owned that portion of the pipeline for which the right-of-way was granted and which traverses their property.

II. Alternatively, a judgment requiring the United States to remove the pipeline.

III. An injunction limiting the purposes for which the United States and/or LIG could use the pipeline.

IV. Damages from the United States in the amount of $22 million.

V. Money damages from the U.S. States and/or LIG *in solido,* in the amount of $22 million.

VI. Recision for lesion beyond moiety of those right-of-way servitudes granted in the LIG Agreement by two of the plaintiff-appellants and others similarly situated.

After answering the lawsuit, the United States and LIG moved to dismiss, arguing the district court lacked subject matter jurisdiction because the Government disclaimed any interest in the property.

On April 8, 1998, the district court denied the motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(6). The district court first concluded that plaintiffs' claims fell under the Quiet Title Act ("QTA") and not the Tucker Act. The district court therefore dismissed Counts II and III because the relief sought was not available under the QTA. The district court also dismissed Count VI of the complaint, the lesion claim, and LIG's counterclaim for expropriation for lack of subject matter jurisdiction. On April 24, 1998, upon the Government's motion for partial reconsideration of the district court's ruling of April 8, 1998, the district court dismissed Counts IV and V as also seeking relief not available under the QTA.

On May 27, 1998, the district court granted summary judgment to the United States and LIG. The court concluded that the Richard Servitude did not restrict the use of the rights-of-way solely to the SPRP and that the rights-of-way could be used for other purposes without being extinguished. The court held that the Government has maintained ownership of the servitudes and the pipeline continuously since 1979, and dismissed plaintiffs' lawsuit.

Petitioners appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the district court's dismissal of the lawsuit.

REASONS FOR DENYING THE WRIT

I. Subject Matter Jurisdiction Under 28 U.S.C. § 2409(a).

The District Court held that petitioners were proceeding exclusively under the Quiet Title Act, 28 U.S.C. § 2409(a), and its jurisdictional counterpart, 28 U.S.C. § 1346(f) — the precise jurisdictional basis asserted by petitioners in their original petition. On January 30, 1998, as an attachment to its motion to dismiss, the Government, filed an affidavit by Patricia Segur which, it claimed, constituted a disclaimer under 28 U.S.C. § 2409(a)(e), thus requiring dismissal for lack of subject matter jurisdiction. Notwithstanding the filing of this disclaimer, the district court found it probable that the Government had not acted in good faith in filing the disclaimer, and refused to confirm the disclaimer under 28 U.S.C. § 2409(a)(e), and held that it retained subject matter jurisdiction to decide the case.

The Fifth Circuit affirmed the district court's ruling, although it did not find that the Government acted in bad faith.

Petitioners now reverse their stance in both the district court and the Fifth Circuit, urging this Court to grant their writ application and vacate the lower court rulings for lack of subject matter jurisdiction.

A. Petitioners are Judicially Estopped From Asserting a Position Before This Court Which Is Diametrically Opposed to the Position They Espoused Before the Lower Courts

The petitioners chose to file their lawsuit in the United States District Court for the Eastern District of Louisiana, asserting subject matter jurisdiction under 28 U.S.C. § 2409(a) and its jurisdictional counterpart, 28 U.S.C. § 1346(f). At both the district court and appellate court levels, Petitioners vigorously opposed the Government's argument that it had disclaimed any interest in the subject pipeline and servitude, and that the district court no longer had subject matter jurisdiction. Now petitioners completely reverse their position, proclaiming with equal vigor that the district court had no discretion to confirm or deny confirmation to the Government's disclaimer, and that under 28 U.S.C. § 2409(a)(e), subject matter jurisdiction was lost upon the filing of that disclaimer.

This Court should not expend judicial time and resources in reviewing a position that the petitioners themselves don or cast aside as circumstances warrant. The time-honored doctrine of judicial estoppel affords the Court an additional basis on which to decline petitioners' writ application.

As an example of the astonishing reversal in petitioners' argument, they stated in their reply brief before the Fifth Circuit:

> The government concedes that the district court had jurisdiction initially, but argues that the declaration of Patricia Segur of January 29, 1998

> was a "disclaimer" under 28 U.S.C. § 2409(a)(e), based on the sale of the disputed property to LIG on August 22, 1997, which divested the district court of jurisdiction. However, as the district court found, this was no disclaimer [citation omitted]. And, even if the declaration does constitute a disclaimer under the QTA, it was ineffective to divest the district court of jurisdiction because it was made after the filing and service of the complaint, and perhaps more importantly, after it exercised its ownership interest in the property by selling it to LIG [citations omitted].[1]

Now petitioners would have this Court ignore the prior argument and adopt the following argument:

> Section 2409(a)(e) expressly provides that federal jurisdiction under the QTA ceases when the United States disclaims its interest in property, and the disclaimer "is confirmed by order of the court." 28 U.S.C.A. § 2409(a)(e). The district court's role in this context is to formalize, by court order, the disclaimer filed by the United States so that the disclaimer may be relied upon by others. The statute provides the district court with no discretion to reject a valid disclaimer on any grounds [citation omitted].[2]

The Fifth Circuit cited two cases in support of its ruling on subject matter jurisdiction, *Bank of Hemet v. United*

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1. Reply Brief of Appellants to the United States Court of Appeals for the Fifth Circuit, page 5.

2. Petition for Writ of Certiorari, page 14.

States, 643 F.2d 661 (9th Cir. 1981), *Delta Savings and Loan v. IRS*, 847 F.2d 248 (5th Cir. 1988). In their reply brief to the Fifth Circuit, petitioners call these cases ". . . are fully applicable here because, similar to this case, the government was arguing for dismissal because it had no interest in the property at issue."[3] Now petitioners style these same cases "clearly distinguishable."[4]

Every federal appellate circuit recognizes the doctrine of judicial estoppel. Judicial estoppel is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that she has previously asserted in the same or in a previous proceeding. It is not intended to eliminate all inconsistencies, however slight or inadvertent; rather, it is designed to prevent litigants from playing fast and loose with the courts. *See In re Chambers Development Co., Inc.*, 148 F.3d 214 (3rd Cir. 1998); *Franco v. Selective Insurance Company*, 184 F.3d 4 (1st Cir. 1999); *King v. Herbert J. Thomas Memorial Hosp.*, 159 F.3d 192 (4th Cir. 1998). Some circuits hold that the position must be a "factual" one, and that the party urging the application of the doctrine must show (1) the party against whom the estoppel is asserted to an inconsistent position in a prior proceeding and (2) that position was adopted by the first tribunal in some manner. *See, e.g., Mitchell v. Washingtonville Cent. School Dist.*, 190 F.3d 1 (2nd Cir. 1999); *In re Coastal Plains, Inc.*, 179 F.3d 197 (5th Cir. 1999). Other circuits do not require the showing of a benefit to the inconsistent party. *See, e.g., Chambers, supra.*; *Coastal Plains, supra.*

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3. Reply Brief of Appellants to United States Court of Appeals for the Fifth Circuit, page 11.

4. Petition for Writ of Certiorari, page 14.

While this Court has not to date formally adopted judicial estoppel as a basis for denial of a writ application, consideration of the doctrine in this case certainly belies any characterization of this case as so compelling as to merit review.

B. The Lower Court Rulings In This Case On the Issue of Subject Matter Jurisdiction under 28 U.S.C. § 2409(a) Do Not Conflict With Any Decision Cited by Petitioners Which Construes That Statute

Plaintiffs argue that the ruling of the lower courts on this issue, "is not only contrary to the express language of the QTA but is contrary to *every* case construing section 2409(a)(e)."[5] Closer examination of the cases they cite to demonstrate this ostensible waywardness — only one of which is an opinion by a Court of Appeals — are either completely distinguishable and have no bearing on this issue, or support the lower court rulings.

In *Lee v. United States*, 629 F. Supp. 721 (D. Alaska 1985), *affirmed*, 809 F.2d 1406 (9th Cir. 1987), *certiorari denied*, 484 U.S. 1041, 108 S. Ct. 772, 98 L. Ed. 2d 859 (1988), the Government was compelled by the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1641, to convey land it owned to a native village corporation, and a lawsuit was filed by disgruntled claimants to the same land. Although the district court found that it had no subject matter jurisdiction due to the filing of a disclaimer by the Government, it noted:

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5. Petition for Writ of Certiorari, Page 8.

> Since the United States' conveyance of the disputed homestead property was required under the terms of the ANCSA, there is no question that its disclaimer is valid and was made in good faith.

Lee, supra, at 726.

Thus, the Alaska district court implied that it could decline to confirm a "bad faith" disclaimer by the United States and thus retain subject matter jurisdiction of the case.

In *Lesnoi, Inc. v. United States*, 170 F.3d 188 (9th Cir. 1999), plaintiff sued the United States to quiet title to land previously conveyed to it by the Government. After the lawsuit was filed, the Government filed a disclaimer of interest and the Court of Appeals confirmed the district court's ruling that it did not even have subject matter jurisdiction to confirm the disclaimer. The case is distinguishable because it does not actually involve the issue of a disclaimer at all; the court held that it lacked subject matter jurisdiction *ab initio* because the Government no longer owned the property at the time the suit was filed and there was thus no "disputed title" entitling the plaintiff to bring the action under 28 U.S.C. § 2409(a).

Madan v. U.S. by and through I.R.S, 850 F. Supp. 148 (N.D.N.Y. 1994) involved an attempted exercise of a right of redemption by the Internal Revenue Service against the transferee of property purchased at a foreclosure sale, and a subsequent lawsuit by that transferee and his seller, the bank which purchased the property at the foreclosure, disputing the exercise of that right and the sale by the I.R.S. For reasons not explained in the decision, the Government filed a disclaimer of interest in the property after the lawsuit had

commenced, thus certifying that it had no further interest in the property. While the district court did note that its confirmation of the disclaimer was a "formality" — language seized upon by the petitioners in the case before this Court as exemplifying their proffered rule that the district court *must* confirm such a disclaimer — the context of the case was, again, resolution of a two-way dispute between the United States and the plaintiffs, with the United States simply confirming that the case was moot. There was no non-plaintiff transferee of the property, no controversy as to ownership, and the case offers no guidance to the lower courts in the present case.

W.H. Pugh Coal Co. v. United States, 418 F. Supp. 538 (E.D. Wis. 1976), did involve the transfer, after suit was filed, of property by the United States to a non-plaintiff — in this instance, the state of Wisconsin — and the subsequent filing and confirming of a disclaimer, but the district court noted:

> If this were a situation in which the state and federal authorities were attempting to whipsaw the plaintiff and to harass it so as to avoid a resolution of this dispute, I would be reluctant to grant the dismissal.

Pugh, *supra*, at 539. This is hardly a ringing endorsement of petitioners' position that the trial court must confirm a disclaimer, and has no discretion to base its decision to confirm such a disclaimer on the particular facts and circumstances of the case.

In *Bily v. Illinois Central Gulf R. Co.*, 637 F. Supp. 127 (N.D. Ill. 1986), the United States, one of many defendants, concluded after suit was commenced that it did not and never

had any valid claim to the property in question, and filed a disclaimer which resulted in its dismissal. This case stands in stark factual contrast to the present case, where the United States clearly had and claimed an interest in the property at issue when the lawsuit was filed, and transferred that claim for consideration to a party other than the plaintiff.

Neither *Block v. North Dakota ex rel. Bd. of University and School Lands*, 461 U.S. 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (U.S. 1983), *United States v. Beggerly*, 524 U.S. 38, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998), nor *Gardner v. Stager*, 103 F.3d 886 (9th Cir. 1996), involved disclaimers, and *Gardner* was not even a lawsuit filed under the Quiet Title Act. These cases are of no help to petitioners and certainly pose no "conflict" to the Fifth Circuit's ruling.

C. *Delta Savings* and *Bank of Hemet* Squarely Support the Fifth Circuit Ruling on Subject Matter Jurisdiction under 28 U.S.C. § 2409(a)

Petitioners argue that the cases relied upon by the Fifth Circuit in this case, *Delta Savings and Loan Association, Inc. v. I.R.S.*, 847 F.2d 248 (5th Cir. 1988), and *Bank of Hemet*, 643 F.2d 661 (9th Cir. 1981), are distinguishable because they involved United States lien interests and not property interests,[6] and in neither case did the United States file a formal disclaimer with the court. Not only is this is a startling reversal of the petitioners' stance before the Fifth Circuit (see Section I above), the courts in *Delta Savings* and *Bank of Hemet* both expressly based their decisions on 28 U.S.C. § 2409(a), found that subject matter jurisdiction should be determined under that statute at the time suit was filed, and

6. And thus, argue petitioners, are subject to 28 U.S.C. § 2410 instead of 28 U.S.C. § 2409.

also found that a sale of the property by the United States was itself a sufficient "disclaimer" to raise the issue under 28 U.S.C.§ 2409(a)(e). Thus, the Ninth and Fifth Circuits — the only courts at the appellate level to rule on the issue — are in harmony, not conflict, as to when jurisdiction under 28 U.S.C. § 2409(a) should be determined.

Petitioners' claim that the ruling of the Fifth Circuit is in conflict with "*every* case construing Section 2409(a)(e),"[7] is simply wrong. The Fifth Circuit decision in this case is not in conflict with any decision of another United States court of appeals on the same matter, nor did it depart "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Rule 10(a), Rules of the Supreme Court of the United States. Thus, there is simply no reason for this Court to grant the writ application.

II. The Lower Court Rulings in This Case Do Not Conflict With the United States Supreme Court Decision in *United States v. Winstar*, the *Erie* Doctrine, or the Full Faith and Credit Clause of the United States Constitution

Petitioners argue that the use of federal common law by the lower courts to interpret the Richard Servitude somehow runs afoul of *United States v. Winstar Corp.*, 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996), *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), and the Full Faith and Credit Clause of the United States Constitution, U.S. Const. art. IV, § 1.

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7. Petition for Writ of Certiorari, page 8.

A. Petitioners Failed to Raise Any Argument Relating to the *Erie* Doctrine or the Full Faith and Credit Clause Before the Fifth Circuit and This Court Should Thus Refuse to Consider Those Arguments

While Petitioners did discuss a violation of the *Winstar* decision in their original appellate brief before the Fifth Circuit, they did not mention any violation of the *Erie* Doctrine or the Full Faith and Credit Clause in that forum, nor did the court consider or pass upon these arguments. Thus this Court should not consider them, in accordance with the traditional rule which precludes a grant of certiorari when the question presented was not pressed or passed upon by the lower courts. *United States v. Williams*, 504 U.S. 36, 112 S. Ct. 1735, 118 L. Ed. 2d 352 (1992).

B. The Present Case Does Not Conflict With *Winstar*, *Erie* or the Full Faith and Credit Clause

According to petitioners, this Court held in *United States v. Winstar*, *supra*, that "the United States is to be treated as any other private party in contractual dealings, and therefore its interests in contracts which it enters into are subject to state law just as any private party's interests are."[8] This is not what *Winstar* held.

United States v. Winstar, *supra*, concerned complaints by various savings and loan associations that the Government had reneged on promises to accord them certain favorable accounting practices if they purchased other, ailing savings & loan associations. Far from holding that the United States

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8. Petition for Writ of Certiorari, page 16.

was "to be treated as any other private party" when considering its rights and obligations under a contract, the Court examined the circumstances under which the United States could assert special defenses essentially stemming from the dual role of sovereign and contractual party. While the Court found the defenses inapplicable in the factual context of that case, it clearly found the defenses alive and well under other circumstances.[9] Thus it is clear the case does not stand for the untenable and insupportable proposition that the United States Government, although acting pursuant to federal statutory authority, is bound to act in accordance with the law of each and every state in which it operates under that authority. The United States, in fact, is not and can never under all circumstances be like "any other private party."

Winstar had nothing to do with the application of federal common law or any conflict between state law and federal common law. The issue of whether or not contracts existed and whether they had been breached had already been determined by the lower courts, *See Winstar Corporation v. United States*, 64 F.3d 1531 (Fed. Cir. 1995); *Winstar Corporation v. United States*, 21 Cl. Ct. 112 (1990); and *Winstar Corporation v. United States*, 25 Cl. Ct. 541 (1992), just as in our case the issue of the rights and obligations

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9. For example, with regard to the defense of "unmistakability", the Court stated:

> The application of the doctrine will therefore differ according to the different kinds of obligations the Government may assume and the consequences of enforcing them.

Winstar, *supra*, at 2457.

flowing from the Richard Servitude have already been determined. *Winstar* has no applicability to this case.

Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), concerns the law to be applied by a federal court sitting in diversity. This also has nothing to do with this case, in which jurisdiction is founded upon the Quiet Title Act and 28 U.S.C. § 1346(f).

Petitioners make no specific argument with regard to the Full Faith and Credit Clause, and respondents will not speculate on what such an argument might be.

To the extent, therefore, that petitioners are attempting to demonstrate that the Fifth Circuit decided an "important federal question in a way that conflicts with relevant decisions of this Court,"[10] they have utterly failed to do so.

III. The Lower Courts Properly Applied Federal Common Law To Interpret the Richard Servitude and Determine That Ownership of the Pipeline and Servitude Did Not Revert to Petitioners

The Fifth Circuit applied federal common law to the present dispute, relying upon its decision in *Bank One Texas v. United States*, 157 F.3d 397 (5th Cir. 1998), *certiorari denied*, 119 S. Ct. 1761, 143 L. Ed. 2d 792 (1999). In applying federal common law, the court is to "look to state law as an aid in determining the application of statutory language to specific facts," although "such state law should be compatible with the purpose of the legislation so as to find the rule that will be effectuate federal policy." *Bank*

10. Rule 10, Rules of the Supreme Court of the United States.

One Texas, *supra*, at 403. This resort to state law "may provide courts with insight about 'ownership, transfer and title to real estate," *Bank One Texas*, *supra*, at 403, and "may also assist in discerning knowledge of the Government's claim." *Ibid.*

Shorn of its Constitutional trappings (see Section II above), petitioners' argument is simply that the lower courts did not glean the correct Louisiana law to guide them in determining the federal common law — hardly an issue that merits the granting of a writ of certiorari by this Court. Furthermore, the district court and the Fifth Circuit had ample grounds to rule precisely as they did.

A. Need for Express Provision for Termination or Revocation of Servitude

Petitioners argue that the Fifth Circuit erroneously concluded that the Richard Servitude had to contain "an express provision for termination or revocation if it was to terminate and revert back to the donors upon a change in use of the pipeline from the establishment of the SPRP to the commercial transportation of gas by LIG."[11]

The Fifth Circuit found after review of *all* of the provisions of the Richard Servitude that the parties thereto did not intend the servitude to terminate if the United States ceased using the pipeline to serve the Strategic Petroleum Reserve Program. This conclusion was based not only upon the absence of any express language in the Richard Servitude to that effect, but also upon the presence of language in the Richard Servitude detailing *other* grounds for termination,

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11. Petition for Writ of Certiorari, page 19.

and language making the servitude "perpetual" and "assignable." Thus, it is clear that the Fifth Circuit, applying federal common law, properly relied upon "general principles of contract and property law, recognized in Louisiana and elsewhere," for guidance in reaching its decision.

Plaintiffs rely upon *Simmons v. Board of Commissioners of the Bossier Levee District*, 624 So.2d 935 (La. App. 2d Cir. 1993) to demonstrate the scope of a "stated purpose" in a servitude. The *Simmons* case, however, does not involve the interpretation of a conventional servitude such as the Richard Servitude, and the attendant determination of the parties' intent. Instead, the Court in *Simmons* was required to interpret the extent of a servitude established by law, *viz.*, La. R.S. 38:113. Thus that case does not assist in the resolution of the case before this Court.

Petitioners also rely upon *Orleans Parish School Board v. Campbell*, 132 So.2d 885 (1961) to support their argument that under Louisiana law no express language is required to preserve a reversionary interest in favor of the grantor of a servitude.

The language interpreted by the court in *Orleans Parish School Board v. Campbell*, 241 La. 1029, 132 So.2d 885 (1961); however, also made it clear that the donor *intended* the purpose of the donation to serve as a resolutory condition, while the Fifth Circuit in the case before this Court expressly found that the parties did *not* intend the purpose stated in the Richard Servitude to serve as a resolutory condition. Most importantly, the language of the donation in *Campbell* did not provide that the rights given by the donor were assignable.

B. Statement of Public Use Not a Resolutory Condition of the Servitude

Petitioners argue that the Fifth Circuit should have looked to the statement of public purpose for which the servitude was acquired in order to determine its permissible scope and use. For this proposition, plaintiffs cite Louisiana Civil Code Article 749. That article states specifically as follows:

> *If the title is silent as to the extent and manner of use of the servitude*, the intention of the parties is to be determined in the light of its purpose.

Louisiana jurisprudence has made it clear that when a servitude is established by the owner of property, the use and extent of that servitude are regulated by the title by which it is created. La. Civ. Code art. 697; *Ogden v. Bankston*, 398 So.2d 1037 (La. 1981); *Ryan v. Southern Natural Gas Co.*, 879 F.2d 162 (5th Cir. 1989). The Civil Code permits the Court to determine the extent and use of a servitude based on its purpose only when the title is silent. *Keeley v. Schexnaider*, 97-1609 (La. App. 3d Cir. 4/1/98), 708 So.2d 838; *Red River v. Noles*, 406 So.2d 294 (La. App. 3d Cir. 1981).

The Richard Servitude states clearly both its extent and allowable use. The extent of the servitude is set forth in the exhibits to the Richard Servitude, which clearly delineate the property which is to be covered by the servitude. Likewise, the language of the Richard Servitude clearly states that it is to be used for "the location, construction, operation, maintenance, alteration, repair and patrol of a single pipeline. . . ." Therefore, there is no reason to resort to an

examination of the statement of public purpose for which the servitude was acquired in order to determine the permissible extent or use of the servitude.

Plaintiffs' argument that the language in the Richard Servitude regarding the Strategic Petroleum Reserve should be construed as a resolutory condition ignores the remaining language which clearly states that the Richard Servitude is perpetual and assignable. The specific language of the agreement states as follows:

> The above named parties declare that we, by this act, do donate, convey, transfer, set over and deliver . . . unto the UNITED STATES OF AMERICA and its *assigns*, including its officers, agents, servants, and contractors, a *perpetual* and *assignable* easement and right-of-way. . . .

The language of the document later reiterates the party's intent that the servitude be perpetual and assignable as follows:

> TO HAVE AND TO HOLD the complete *perpetual* rights, powers, privileges of the easement and/or servitude hereby conveyed unto the UNITED STATES OF AMERICA and its *assigns*. . . .

The language which the plaintiffs rely on to create their "resolutory condition" states:

> . . . we, by this act, do donate, . . . unto the United States of America. . . a perpetual and assignable easement and right-of-way in, on, over and across

> the land for the location, construction, operation, maintenance, alteration, repair and patrol of a single pipeline in the *establishment, management, and maintenance of the Strategic Petroleum Reserve*. . . .
>
> * * *
>
> This donation is made and accepted for and in consideration of grantors desire to aid their country in the *establishment of a Strategic Petroleum Reserve* and in further consideration of grantee's agreement to construct and operate said pipeline in accordance with the following specific requirements. . . .

The Secretary of the Department of Energy is the only person who is statutorily granted authority over "the establishment, management and maintenance" of the Strategic Petroleum Reserve, 42 U.S.C. § 6233, as the district court properly pointed this out in dismissing plaintiffs' claims. *Lafargue v. United States*, 4 F. Supp. 2d 593, 604 (E.D. La. 1998). Therefore, if the language regarding the Strategic Petroleum Reserve is interpreted as a resolutory condition, the language specifically allowing assignment of the servitude would be rendered meaningless.

The Fifth Circuit's interpretation of the language regarding acquisition of the servitude for the Strategic Petroleum Reserve gives meaning to all provisions of the contract. In the course of preparing to construct this pipeline, the Government was simply attempting to make it clear that the Richard Servitude and others like it were being acquired for a public purpose. The language quoted above reflects

clearly that the parties intended to allow transfer of this servitude by the Government.

C. Servitude Was Not Terminated Because Its Use Became "Impossible"

Finally, petitioners argue that the pipeline servitude was terminated when its use became "impossible."[12] Petitioners argue that because the Government no longer uses the pipeline to transport crude oil, use of the servitude has become impossible. They further argue that this should be regarded as grounds for termination of the servitude.

Plaintiffs cite no statutory or jurisprudential authority for their argument. Furthermore, the argument fails if transfer of the pipeline and servitude to a third party is permitted by the servitude contract — which, as previously demonstrated, is true in this case. Thus, while the initial use of the pipeline may no longer be practicable, its present use by a third party falls within the scope of the contract and the intent of the parties, and use of the servitude thus clearly continues to be "possible."

The only support which plaintiffs cite for their argument is a law review article on predial servitudes. Yiannopoulos, *Extinction of Predial Servitudes*, 56 Tul L. Rev. 1285 (1982), which they refer to in their brief.[13] The language quoted, however, makes clear that Professor Yiannopoulos' theory is based on the principle that a predial servitude must confer a benefit on the dominant estate. In the case of a *right of*

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12. Petition for Writ of Certiorari, page 28.

13. Petition for Writ of Certiorari, page 28.

use, such as the Richard Servitude, there is no dominant estate.

CONCLUSION

The Fifth Circuit holding on the issue of subject matter jurisdiction under 28 U.S.C. § 2409(a)(e) is in harmony with the Ninth Circuit, the only other Court of Appeals which has ruled on that question. *See*, *Delta Savings & Loan*, *supra*, and *Bank of Hemet*, *supra*. Although some of the district court opinions cited by petitioners may differ from the Fifth Circuit in certain particulars, they all allow the trial court discretion to decline to accept a disclaimer if circumstances warrant. Accordingly, these decisions are closer to that issued by the Fifth Circuit in this case than they are to the position espoused by petitioners, to wit, that the trial court *must* confirm a disclaimer, whenever filed and regardless of the circumstances.

There is no conflict among the appellate courts with regard to this issue, nor is the Fifth Circuit ruling a departure from "the accepted and usual course of judicial proceedings" so as to merit review by this Court under Rule 10 of the Rules of the Supreme Court of the United States. The Fifth Circuit ruling should be left undisturbed.

Although petitioners proffer an argument, of sorts, that the Fifth Circuit ruling conflicts with *United States v. Winstar*, *Erie Railroad Company v. Tompkins* and the Full Faith and Credit Clause, these cases and this Constitutional provision have nothing to do with this case and any "conflict" is illusory. Furthermore, petitioners raised no argument relating to *Erie* or the Full Faith and Credit Clause in the

lower courts. This Court should also decline to review this argument, and leave the Fifth Circuit ruling undisturbed.

The petitioners are actually arguing that the district court and the Fifth Circuit incorrectly ascertained the Louisiana law to use as guidance and assistance in defining the applicable federal common law. Although the lower courts were not *bound* by Louisiana law, since they were applying federal common law, in fact they properly identified and applied Louisiana law. This argument does not merit review by this Court, and the Fifth Circuit ruling should not be disturbed.

Respectfully submitted,

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No. 99-1165

In the Supreme Court of the United States

JERON J. LAFARGUE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether subject matter jurisdiction existed over petitioners' claim under the Quiet Title Act, 28 U.S.C. 2409a.

2. Whether the right-of-way easements conveyed in a donation to the United States were abandoned or terminated when the United States subsequently transferred those property rights to a third party.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Bank of Hemet v. *United States*, 643 F.2d 661 (9th Cir. 1981)	5, 10
Davis v. *Wakelee*, 156 U.S. 680 (1895)	8
Delta Sav. & Loan Ass'n v. *IRS*, 847 F.2d 248 (5th Cir. 1988)	5, 10
Erie R.R. v. *Tompkins*, 304 U.S. 64 (1938)	10
Gardner v. *Stager*, 103 F.3d 886 (9th Cir. 1996), cert. denied, 522 U.S. 811 (1997)	8, 10
Lee v. *United States*, 629 F. Supp. 721 (D. Alaska 1985), aff'd, 809 F.2d 1406 (9th Cir. 1987), cert. denied, 484 U.S. 1041 (1988)	8, 9
LaFargue v. *United States*, 4 F. Supp. 2d 580 (E.D. La. 1998)	3, 4, 7
Leisnoi, Inc. v. *United States*, 170 F.3d 1188 (9th Cir. 1999)	8, 9
United States v. *Winstar Corp.*, 518 U.S. 839 (1996)	10, 12

Constitution and statutes:

U.S. Const. Art. IV, § 1 (Full Faith and Credit Clause)	10-11
Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*	9
Energy Policy and Conservation Act, 42 U.S.C. 6201 *et seq.*	2
42 U.S.C. 6239(f)(1)(B)	2

Statutes—Continued: Page

42 U.S.C. 6239(f)(1)(C) 2
42 U.S.C. 6239(f)(1)(D) 2
Quiet Title Act, 28 U.S.C. 2409a 3-4, 5, 7
28 U.S.C. 2409a(a) 9, 10
28 U.S.C. 2409a(e) 4, 5, 6, 7, 8, 9, 10
28 U.S.C. 1346(a)(2) 3
28 U.S.C. 1346(f) 4
La. Civ. Code Ann. art. 2050 (West 1987) 11

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is unpublished, but the decision is noted at 193 F.3d 516 (Table). The opinion of the district court (Pet. App. B1-B28) is reported at 4 F. Supp. 2d 593.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1999. A petition for rehearing was denied on October 13, 1999 (Pet. App. C3). The petition for a writ of certiorari was filed on January 11, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are 15 landowners who granted right-of-way easements to the United States in the 1970s for the construction of an oil pipeline in Louisiana as part of the Strategic Petroleum Reserve Program (SPRP). Congress established the SPRP under the Energy Policy and Conservation Act (EPCA), 42 U.S.C. 6201 *et seq.*, for the purpose of providing a petroleum reserve to reduce the impact of supply interruptions or reductions in imports of crude oil and refined petroleum products. The EPCA provides the federal government with authority to "acquire by purchase, condemnation, or otherwise, land or interests in land for the location of storage and related facilities." 42 U.S.C. 6239(f)(1)(B). Under the EPCA, the government may also "construct, purchase, lease, or otherwise acquire storage and related facilities," and "use, lease, maintain, sell, or otherwise dispose of storage and related facilities acquired pursuant to this part." 42 U.S.C. 6239(f)(1)(C) and(D).

In furtherance of the SPRP, the government constructed a 36-inch diameter pipeline extending approximately 67 miles between the government-owned terminal in St. James Parish, Louisiana, and its storage facility at Weeks Island, Louisiana. Pet. App. B2. In preparation for the construction, the government sought and obtained right-of-way easements from petitioners, or their predecessors, who executed a document, entitled Donation of Servitude and Easement (Donation), to "donate, convey, transfer, set over and deliver, * * * unto the UNITED STATES OF AMERICA and its assigns, * * * a perpetual and assignable easement and right-of-way in, on, over and across [their] land for the location * * * of a single pipeline in the establishment, management, and main-

tenance of the Strategic Petroleum Reserve." *Id.* at E6.

The pipeline was completed in 1979, and was in service as part of the SPRP from October 1980 to March 1997. In 1997, due to geotechnical problems at Weeks Island, the government decommissioned and sold the pipeline along with all rights-of-way, easements, and servitudes to Louisiana Intrastate Gas Company (LIG) for $22,000,000. The pipeline was sold "as is" and "where is" under a quitclaim deed. LIG now uses the pipeline to transport natural gas. Pet. App. B4-B5.

2. On July 31, 1997, petitioners, on behalf of themselves and a class of others similarly situated, filed suit against the United States and LIG seeking a judicial declaration that the easements they granted the United States had expired or terminated, and that they owned that portion of the pipeline for which the rights-of-way were granted (Count I). Pet. App. B6. Petitioners alternatively sought a judgment requiring the United States to remove the pipeline (Count II), or an injunction limiting the purposes for which the United States and LIG may use the pipeline (Count III). Petitioners sought $22,000,000 in damages from the United States. See *LaFargue* v. *United States*, 4 F. Supp. 2d 580, 583-584 (E.D. La. 1998).

The United States filed a motion to dismiss, arguing that the district court lacked subject matter jurisdiction because the government had disclaimed any interest in the pipeline, and petitioners' damages claim exceeded the amount necessary to maintain concurrent jurisdiction over petitioners' takings claim pursuant to 28 U.S.C. 1346(a)(2). The district court denied the government's motion, concluding that petitioners were seeking relief pursuant to the Quiet Title Act (QTA), 28 U.S.C.

2409a, and its jurisdictional counterpart, 28 U.S.C. 1346(f). The court did, however, dismiss Counts II and III as seeking relief not available under the QTA. See *LaFargue*, 4 F. Supp. 2d at 593. In denying the motion to dismiss petitioners' QTA claim, the district court recognized that its jurisdiction under the QTA ceases "[i]f the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial." *Id.* at 588 (quoting 28 U.S.C. 2409a(e)). The district court concluded, however, that the government's disclaimer of its interest on August 22, 1997, did not cause federal jurisdiction to cease because the sale of the property to LIG post-dated the filing of petitioners' complaint. For that reason, the district court did not confirm the government's disclaimer of its interest in the pipeline for purposes of QTA jurisdiction. 4 F. Supp. at 589.

On the merits, the district court subsequently granted summary judgment to the United States and LIG. Pet. App. B1. Applying Louisiana law and general principles of federal law, the court concluded that the Donation granting the easements did not restrict their use to the government's SPRP and that the easements could be used in a manner that did not aid the SPRP without being extinguished. *Id.* at B23-B28.

3. The Fifth Circuit, in an unpublished opinion, affirmed the district court's grant of summary judgment. Pet. App. A1-A17.

a. With respect to subject matter jurisdiction under the QTA, the court of appeals held that the disclaimer provision of 28 U.S.C. 2409a(e) "does not apply where the district court had jurisdiction at the commencement of suit and the government thereafter takes affirmative steps to transfer its interest in the subject property."

Pet. App. A3. The court concluded that the language of the disclaimer provision manifests Congress's intent to permit the courts some flexibility in its application because it provides for a cessation of jurisdiction only if the disclaimer is "confirmed by order of the court." *Id.* at A4 (quoting 28 U.S.C. 2409a(e)). The court observed that its holding is consistent with the general rule that jurisdiction is determined at the time a complaint is filed. *Ibid.* The court also expressed the view that permitting the government to disclaim its interest at any time prior to trial would lead to a waste of judicial resources by allowing the government to alter its position in response to the particular claims set forth in a complaint. *Ibid.* Finally, the court found its interpretation of Section 2409a(e) to be consistent with *Delta Savings & Loan Association* v. *IRS*, 847 F.2d 248 (5th Cir. 1988), and the Ninth Circuit's decision in *Bank of Hemet* v. *United States*, 643 F.2d 661 (1981), which held that jurisdiction under Section 2409a must be determined at the time the complaint is filed. Pet. App. A5-A6.

b. The court of appeals next rejected petitioners' claim that the decommissioning of the pipeline by the government resulted in either an abandonment of the pipeline or the termination of the easements, causing a reversion of the easements and pipeline to petitioners. Pet. App. A7. The court first held that, while the QTA should be interpreted in accordance with general principles of federal law, courts "may properly look to state law as an aid in determining the application of statutory language to specific facts" where such law does not conflict with federal policy. *Ibid.* The court found that, under Louisiana law, the government's transfer of the pipeline to LIG did not amount to an "abandonment" because it did not relinquish ownership

without vesting ownership in another. *Id.* at A9. The court explained that petitioners' abandonment interpretation conflicted with express language of the Donation providing that the donors conveyed an assignable interest to the government. *Id.* at A10.

The court next rejected petitioners' alternative argument that the easements terminated because the government ceased using the pipeline for the SPRP. The court observed that the Donation contained specific conditions for termination, including non-use, abandonment, and failure to commence construction by December 1, 1981, but it did not provide for termination if the use of the pipeline changed. Pet. App. A11. Because Louisiana law requires a donor expressly to reserve a right of reversion, the court of appeals refused to read an implied termination into the Donation based on the Donation's purpose of conveying an easement for the location of a pipeline as part of the SPRP. *Id.* at A11-A12.

Judge Emilio M. Garza dissented, stating that he would have held that the district court was divested of subject matter jurisdiction as a result of the government's disclaimer of its interest in the pipeline under Section 2409a(e). Pet. App. A16-A17.

ARGUMENT

Petitioners abandon their prior legal position that federal jurisdiction exists over their complaint and now contend that the QTA did not confer federal jurisdiction in this case. The only apparent reason why they would take that new position now is to erase the claim-preclusive effect of the judgment on the merits so that they may attempt to relitigate their claims in state court. This Court should not grant review to promote that result. Alternatively, petitioners assert that the

court of appeals erred by ruling that the United States may assign its interest in the pipeline easements to LIG under the Donation. Petitioners identify no conflict between the decision below and any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners ask this Court to dismiss their own complaint for lack of federal jurisdiction, a request that completely reverses their legal position in this case from the filing of their QTA claim in federal court through the issuance of the court of appeals' decision. See *LaFargue*, 4 F. Supp. 2d at 585 (discussing complaint's assertion of jurisdiction under the QTA, 28 U.S.C. 2409a); Pet. App. A2-A6. Throughout the proceedings in the district court and court of appeals, petitioners have consistently and vigorously opposed the government's argument that federal jurisdiction was lacking under Section 2409a(e) as a result of the government's disclaimer of its interest in the pipeline.[1] Both the district court and court of appeals ruled in favor of petitioners on that jurisdictional issue, while denying petitioners relief on the merits of their claim seeking to divest the government (and LIG) of title to the relevant rights-of-way.

Only now, after having lost on the merits at each level of these proceedings, do petitioners seek to have this case dismissed in federal court for lack of jurisdic-

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[1] See Plaintiffs' Consolidated Opposition Memorandum to Defendants' Motions to Dismiss and/or to Transfer 6-10 (Feb. 9, 1998); Plaintiffs' Supplemental Opposition to Defendants' Motions to Dismiss 1-4 (Mar. 2, 1998); Plaintiffs-Appellants' Motion to Strike, or in the Alternative, for Enlargement of Time to File Reply Brief and Brief Length; and Motion to Reduce Delay for Response to this Motion 1-5 (Dec. 1, 1998); Reply Brief of Appellants 4-13 (Dec. 11, 1998).

tion as a predicate to relitigating their substantive claims in state court. That sudden assertion of a lack of jurisdiction over their own complaint at this late stage in the litigation, and its associated waste of federal judicial resources, does not warrant this Court's review. See *Davis* v. *Wakelee*, 156 U.S. 680, 689 ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position."). Petitioners thus impermissibly seek "two bites of the apple," by asserting federal jurisdiction over their complaint while reserving the option of returning to state court in the event they fail to obtain relief on the merits in federal court.

2. That is not to say that we disagree with petitioners' new position on jurisdiction. In our view, the dissent below correctly states the law on QTA jurisdiction under 28 U.S.C. 2409a(e). See Pet. App. A16-A17. Notwithstanding that error by the court below, further review of that issue is not warranted. Petitioners contend (Pet. 8) that the decision below "is contrary to the express language of section 2409a(e) of the QTA and every district and federal appellate court that has construed section 2409a(e)." Only three of the decisions upon which petitioners rely are court of appeals decisions, however, and each is inapposite. See Pet. 8, 12 (citing *Lee* v. *United States*, 629 F. Supp. 721 (D. Alaska 1986), aff'd, 809 F.2d 1406 (9th Cir. 1987), cert. denied, 484 U.S. 1041 (1988); *Leisnoi, Inc.* v. *United States*, 170 F.3d 1188 (9th Cir. 1999); and *Gardner* v. *Stager*, 103 F.3d 886 (9th Cir. 1996), cert. denied, 522 U.S. 811 (1997)).

In *Lee*, for example, the relevant government disclaimer occurred prior to—not after—the filing of the

plaintiff's complaint. See 809 F.2d at 1408-1409 (stating that disclaimer occurred at time of the 1979 land conveyance, which was prior to the filing of the complaint). Furthermore, the district court in *Lee* had concluded that the disclaimer was required under the terms of the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.* 809 F.2d at 1409 (quoting 629 F. Supp. at 726). That overriding condition on the conveyance of property was not present in the instant case. In any event, the court in *Lee* ultimately rejected the claims against the United States as barred by the statute of limitations, thereby relegating to dicta its statements on the disclaimer. See *id.* at 1409.

In *Leisnoi*, the court addressed not whether it was divested of jurisdiction by the United States' disclaimer of interest under Section 2409a(e), but rather whether the court had jurisdiction at the commencement of the litigation pursuant to Section 2409a(a). 170 F.3d at 1192-1193. Section 2409a(a), which petitioners have not put in issue in this litigation, provides that "[t]he United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. 2409a(a). As the *Leisnoi* court concluded, "[f]or *initial* jurisdiction to lie, therefore, there must be a conflict in title between the United States and the plaintiff." 170 F.3d at 1192 (emphasis added). On the facts presented in *Leisnoi*, the court held that a state court decision had removed any cloud on the transfer of title between the United States and the third-party transferee and thus that there was "no colorable conflict" between an interest of the United States and the plaintiff "[a]t the time the complaint was filed" in federal district court. *Id.* at 1193 (relying on

initial jurisdiction under 28 U.S.C. 2409a(a)). That holding of a lack of jurisdiction under Section 2409a(a) has no bearing on the issue presented here, which is whether the disclaimer of interest by the United States prior to trial divested the court of jurisdiction under Section 2409a(e).[2]

Finally, *Gardner* is inapposite. In that case, the plaintiffs' suit was held to be barred because they had not sued under the QTA. 103 F.3d at 888. Petitioners quote the language of Section 2409a(e) that a disclaimer may be made "at any time prior to the actual commencement of trial," but incorrectly attribute (Pet. 12) that language to the *Gardner* court, which neither cited nor discussed Section 2409a(e). See 103 F.3d at 886-888. Thus, notwithstanding the erroneous jurisdictional ruling by the court of appeals in this case, its holding does not conflict with the appellate decisions cited by petitioners.[3]

3. In the alternative, petitioners contend that the court of appeals improperly relied on federal common law, and that its decision therefore is inconsistent with *United States* v. *Winstar Corporation*, 518 U.S. 839

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[2] We concede that the requisites of Section 2409a(a) were satisfied when petitioners filed their complaint. Our position is and has been, however, that the court subsequently was divested of jurisdiction under Section 2409a(e) by the government's disclaimer of interest in the property rights conferred by the Donation.

[3] As previously argued by the government and now argued by petitioners (Pet. 14-15), the court of appeals could have distinguished *Delta Savings & Loan Association* v. *IRS*, 847 F.2d 248 (5th Cir. 1988), and *Bank of Hemet* v. *United States*, 643 F.2d 661 (9th Cir. 1981), on the grounds that those decisions merely held that QTA jurisdiction must be determined at the time a complaint is filed and did not specifically address the disclaimer provision of Section 2409a(e). See note 2, *supra*.

(1996), *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), and the Full Faith and Credit Clause of the Constitution, U.S. Const. Art. IV, § 1. Petitioners argue (Pet. 16) that, despite their own decision to file this action as a QTA suit against the United States in federal court, the court of appeals erred by applying federal law in this case because the underlying issue involves the interpretation of a contract between "private citizens." That argument is without merit.

Although the court below stated that the "Quiet Title Act should be interpreted 'in accordance with principles of federal law,'" Pet. App. A7, it construed the Donation as a contract under Louisiana state law. The court held that "[u]nder Louisiana law, '[e]ach provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole.'" *Id.* at A10 (quoting La. Civ. Code Ann. art. 2050 (West 1987)). The court rejected petitioners' argument that the transfer of the pipeline amounted to an abandonment, explaining that under Louisiana law, there must be a relinquishment of property without vesting ownership in another for abandonment to occur. Pet. App. A9-A10. The court further held that: Louisiana law requires a donor expressly to reserve a right of reversion; the language of the Donation here did not do so and, in fact, stated that the conveyance was "perpetual" and "assignable"; and the Donation could not be construed to contain an implied right of reversion, as urged by petitioners. *Id.* at A11-A12.

Despite the court's holding based on the Louisiana Civil Code and the state cases construing it, petitioners refer (Pet. 20-22) to the court's citation to three non-Louisiana cases (Pet. App. A13) as evidence that the court improperly relied on "federal common law." Peti-

tioners fail to point out, however, that the court did not base its decision on those cases. Rather, the court stated that it found those cases "persuasive" and consistent with its decision that the property interest did not revert to the grantors under Louisiana law based upon the original purpose for the Donation. *Ibid.*[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

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APRIL 2000

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[4] Contrary to petitioners' argument, this Court's decision in *Winstar* did not address the choice-of-law question posed by petitioners. The relevant language from *Winstar* cited by petitioners (Pet. 16) addressed the sovereign acts doctrine and whether the government may discharge its contractual liability by enacting subsequent legislation exculpating itself from such liability. 518 U.S. at 891-898 (opinion of Souter, J.). This Court's rejection of the sovereign acts defense in the context presented by *Winstar* is not applicable in this case, where the relevant federal statute was enacted prior to the contract at issue, does not address in any manner the government's liability under that contract, and, in fact, is a jurisdictional statute. Nor does the court of appeals' reference to principles of federal law in interpreting the QTA violate this Court's ruling in *Erie*. Unlike *Erie*, this case is not based on federal diversity jurisdiction. Petitioners based their claim on the QTA, which contains specific statutory requirements pertaining to the maintenance of an action against the federal government.